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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
a corporation,
(Defendant) Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
a corporation,
(Plaintiff) Appellee.

BRIEF OF APPELLANT.

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(Plaintiff) Appellee.

BRIEF OF APPELLANT.

I.

OFFICIAL REPORT OF OPINIONS BELOW.

The official opinions of the Supreme Court of Illinois in this case are reported in Volume 363, Illinois Reports, at pages 559, and 610.

II.

STATEMENT OF THE CASE.

This is an appeal by the (defendant) appellant, Old Dearborn Distributing Company, a corporation, from the final judgment of the Supreme Court of Illinois, sustaining the constitutionality of the "Fair Trade Act" hereinafter set forth in full, and affirming a final decree of the Circuit Court of Cook County, Illinois, entered November 30, 1935, after trial before the court without a jury, permanently restraining and enjoining the (defendant) appellant amongst other things from wilfully and knowingly advertising, offering for sale, or selling certain branded liquors sold under the trade name of "Seagram" products and "Kessler" products anywhere in Illinois at less than the prices stipulated by (plaintiff) appellee from time to time under said "Fair Trade Act" of Illinois (Chapter 140, Secs. 8 to 11, Ill. Rev. Stats. 1935, p. 3091) in accordance with the terms of contracts made pursuant to the Act between (plaintiff) appellee and persons other than the parties hereto.

A. The Pleadings.

The complaint sets up that the plaintiff, a sales agency for liquors manufactured by two corporations, Jos. E. Seagram & Sons Ltd., and the same Inc., entered into a contract with the (defendant) appellant, similar in form to contracts with others, under and pursuant to the "Fair Trade Act" of Illinois, wherein and whereby the defendant agreed to resell any and all liquors sold by the (plaintiff) appellee in Illinois, no matter from whom purchased by the (defendant) appellant, at not less than the minimum resale price fixed and maintained by the (plaintiff) appellee from time to time, all in accordance with other Fair

Trade contracts executed by (plaintiff) appellee with others than the (defendant) appellant as a part of a system of resale price maintenance operated by (plaintiff) appellee; that the (defendant) appellant violated the terms of the "Fair Trade Act" and the provisions and terms of the alleged contract with the (plaintiff) appellee, and its contracts with others by selling below the minimum resale prices so fixed by (plaintiff) appellee. The complaint prayed for equitable relief by way of injunction to prevent (defendant) appellant from selling below the prices stipulated in the resale price maintenance contracts of the (plaintiff) appellee in question.

Plaintiff contended that Section 2, of the "Fair Trade Act" is constitutional as applied to the instant cause, and that it was entitled to the injunction irrespective of the validity of its purported contract with (defendant) appellant. The Illinois Supreme Court agreed with this contention.

The answer admits that the (defendant) appellant sold merchandise in Illinois, of the type and description set forth in the complaint, and of which the plaintiff was the original owner, below prices stipulated in the resales agreements of the (plaintiff) appellee with others; that the defendant purchased these liquors so sold by it at these reduced prices from persons other than the plaintiff; that the purported contract with the plaintiff was executed without authority of the defendant corporation, that it was *ultra vires;* that the purported contract is without consideration and violative of the provisions of the Constitutions of Illinois and the United States of America; that the Illinois "Fair Trade Act," Chapter 140, Secs. 8 to 11, inclusive, Ill. Rev. Stats. 1935, page 3091, is unconstitutional and void because it among other things violates Section 1 of the Fourteenth Amendment to the Constitution of the

United States of America as well as certain designated provisions of the Constitution of the State of Illinois; that the purported contract with the (defendant) appellant lacked mutuality and was void; that the entire agreement and system of contracts for resale price maintenance adopted by the (plaintiff) appellee is and was contrary to the public policy of the State of Illinois and violative of the anti-trust act of the state; that the (plaintiff) appellee is not entitled to equitable relief because it comes into a court of equity with unclean hands; that the acts of the (plaintiff) appellee in combination with others is in violation of the Sherman Anti-Trust Act, and that the Illinois "Fair Trade Act" is an unreasonable burden on interstate commerce and therefore void. It concludes with the usual prayer for the dismissal of the complaint for want of equity and for the denial of the injunctive relief prayed thereunder.

The plaintiff filed a short reply denying all the affirmative allegations of new matter contained in the answer.

(1) Plaintiff's Theory.

Plaintiff's theory of the case is that under and pursuant to the Illinois "Fair Trade Act," it has a valid and binding contract with the defendant for the maintenance of resale prices of all merchandise distributed by the plaintiff in Illinois, and subsequently acquired by the defendant, whether from the plaintiff or from other persons, and that in the event that the contract be for any reason void, still under Section 2 of the Illinois "Fair Trade Act," the defendant whether or not it be in contractual relationship with the plaintiff is compelled to abide by the provisions of the resale price maintenance contracts made by the plaintiff with persons other than the defendant; that the acts of the defendant in selling its merchandise at reduced

prices is actionable in equity to the extent of permitting the issuance of injunctive relief because of the declared legislative fiat that the acts of the defendant constitute unfair competition, and inflict irreparable injury upon the good will of the plaintiff, and its brand of merchandise sold under its name, which was the theory adopted by the Supreme Court of Illinois in 363 Ill. 610, sustaining the constitutionality of the statute.

(2) Defendant's Theory.

The defendant proceeds on the theory that it has no contract with the plaintiff whatsoever; that the contract if any there be, is void because in violation of the public policy of Illinois, its anti-trust Act, is without consideration, unilateral, lacks mutuality, and is not permissive of injunctive relief; that the Illinois "Fair Trade Act" is in all its provisions unconstitutional and void because it is contrary to the express provisions of the State Constitution as well as the Fourteenth Amendment to the Constitution of the United States of America; and that the acts of the plaintiff are illegal, in violation of the Sherman Anti-Trust Law, the Clayton Act, the Fair Trade Act, and the common law; and that the conduct of the plaintiff is illegal and of such nature as to deny it any injunctive relief.

B. The Facts.

We state the facts from the opinion of the court in 363 Ill. 610:

> "There is no material dispute as to the facts. Plaintiff a Delaware corporation licensed to do business in Illinois, deals in alcoholic beverages solely at wholesale. It does not manufacture, but buys, Seagram's whiskys and gins and Kessler's blended whiskys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corpo-

rations. Its place of business in this State is in the city of Chicago. It has been so engaged in business since July, 1934. The commodities it sells bear labels and trade-marks, and they are in fair and open competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in the city of Chicago. Its charter powers include sales at both wholesale and retail. Plaintiff's sales in Chicago have been confined to wholesale distributors. It has never sold any of the products in controversy to the defendant but has sold other liquors to it. Contracts in conformity with the terms of the Fair Trade act have been executed between plaintiff and certain distributors and between plaintiff and certain numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer. One of such contracts was executed by plaintiff and signed by defendant's secretary and treasurer. The contracts provide that the Seagram products shall not be sold, advertised or offered for sale in Illinois below the prices stipulated by plaintiff. Defendant sold such merchandise at cut prices but at a profit to itself. It continued to do so after plaintiff's demand that it cease such practice. On account of such price-cutting, plaintiff and other retailers dealing in Seagram products suffered a diminution of sales during the price-cutting period. Some dealers took the products from display, and some of them notified plaintiff they could not compete with the defendant and would discontinue handling Seagram products unless the price-cutting was stopped. Defendant was a party to breaches of other fair trade contracts between plaintiff and certain distributors, and continued the price-cutting throughout the trial of the instant case."

C. The Decree.

The decree found (1) the court to have jurisdiction; (2) that plaintiff had proceeded in accordance with law, that the material allegations of the complaint were proven, and the similar allegations of the answer not proved; and (3)

that the equities were with the plaintiff and it was entitled to the relief prayed.

The decree then enjoins the defendant from wilfully and knowingly advertising, offering for sale or selling the merchandise of the nature and kind described in the complaint, and for convenience herein denominated as "Seagram's products" anywhere in Illinois at less than the prices stipulated by the plaintiff from time to time under the Illinois "Fair Trade Act" in accordance with the terms and provisions of contracts made pursuant to the Act, between plaintiff and its distributors or between plaintiff and retailers, which contracts, at the time of the filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any of plaintiff's beverages. (Rec. 1.)

III.

SPECIFICATION OF ERRORS.

(A) The Supreme Court of Illinois erred in giving judgment, affirming the judgment of the Circuit Court of Cook County, Illinois, holding the Illinois "Fair Trade Act, to-wit: Chapter 140, Secs. 8 to 11, inclusive, Ill. Rev. Stats. 1935, to be a constitutional act, and in failing to render judgment for the defendant because said Illinois Fair Trade Act" violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of its liberty and property without due process of law, and denies to it the equal protection of the laws, all as set forth in the Assignment of Errors Numbers 1 to 12, inclusive, and is beyond the power of the legislature of the State of Illinois to enact.

SUMMARY OF ARGUMENT.

A.

The Illinois Fair Trade Act deprives the defendant and appellant retailer of liberty and property without due process of law, and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

I.

1. **The basic statute—its analysis—gist of plaintiff's cause of action.**

   A. The nature, purposes and reasons for the enactments and legislative history of the statute is found in the attempt to destroy alleged predatory price cutting.

   No. 23—Final legislative synopsis and digest of the 59th General Assembly of Illinois.

   Nebbia v. *New York*, 291 U. S. 502.

   The Statute—Chapter 140, Secs. 8-11, Ill. Rev. Stats. 1935.

   (a) The economic point of view.

   Triner Corp. v. *McNeil*, 363 Ill. 559.

   Max Factor & Co. v. *Kunsman*, 55 Pac. (2d) 177.

   Chemical Foundation Brochure No. 7. The only real security.

   (b) Gist of plaintiff's alleged cause of action.

   Seagram Distillers Corporation v. *Old Dearborn Distributing Co.*, 363 Ill. 610.

   Analysis of the Statute.

(c) Constitutional aspect of the statute.

Champlin Refining Co. v. *Comm.*, 286 U. S. 210.

(1) Constitutionality.

Historical Background.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373 (1911).

Act of July 2, 1890, c. 647, 26 Stat. at L. 209; 15 U. S. C., par. 1.

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Victor Talking Machine Co. v. *Kennedy*, 271 Fed. 810 (C. C. A. (3d) 1921).

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339.

(2) The opinion of economists or the legislature that price-fixing is socially desirable does not establish the constitutionality of the statute.

Schechter v. *U. S.*, 295 U. S. 495.

R. R. Retirement Board v. *Alton R. R.*, 295 U. S. 330.

II.

The two sections of the Fair Trade Act are interdependent and part of one legislative system designed to accomplish one object, i. e., the elimination of price cutting. If either subsection is unconstitutional, the whole act fails.

Carter v. *Carter Coal Co.*, Vol. 80—No. 15, pages 749-788 U. S. Supreme Court (Law Ed.) Adv. Op.

Winter v. *Barrett*, 352 Ill. 441.

Garst v. *Hall & Lyon & Co.*, 179 Mass. 588 (1901).

Riccio v. *Hoboken*, 69 N. J. L. 649, 662.

III.

The Illinois "Fair Trade Act" deprives retailers of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

A. Constitutional Principles.

14th Amendment Constitution of the United States.

Tyson v. *Banton*, 273 U. S. 418, 429.

Buchanan v. *Warley*, 245 U. S. 60, 74.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111.

Allgeyer v. *Louisiana*, 165 U. S. 578, 589.

Nebbia v. *N. Y.*, 291 U. S. 502, 503.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 277.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 537.

B. Since the effect and purpose of Section 2 of the statute is the fixing of prices on ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the legislature.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522.

Tyson v. *Banton*, 273 U. S. 418.

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1.

Ribnick v. *McBride*, 277 U. S. 350.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

People v. *Gillson*, 109 N. Y. 389.

People v. *Steele*, 231 Ill. 340.

People v. *Nebbia*, 262 N. Y. 264, 265.

People v. *Nebbia*, 291 U. S. 502, 523, 526.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 277, *et seq.*

United Theatre Offices Inc. v. *Banton*, 47 Sup. Ct. Rep. 426; 273 U. S. 418.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.

Block v. *Hirsh*, 256 U. S. 135, 137.

Darweger v. *Staats*, 267 N. Y. 290, 308.

People v. *Budd*, 177 N. Y. 1, 27.

People v. *Budd*, 143 U. S. 517, 532.

Adams v. *Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917-E 1163, 37 Sup. Ct. 662, Ann. Cas. 1917-D 973.

3 Williston on Contracts, page 2907, Sec. 1649.

Dr. Miles Med. Co. v. *Park, etc.*, 220 U. S. 373 (1911).

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339 (1908).

Bauer v. *O'Donnell*, 229 U. S. 1.

19 Columbia Law Rev. 265.

IV.

Legislation identical with Section 2 of the Fair Trade Act has been held invalid by the court of last resort in New York and held valid by the court of last resort in California by a divided court, two judges filing dissenting opinions.

Doubleday Doran & Co. v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409.

Max Factor & Co. v. *Kunsman*, 91 Cal. Dec. 345; 55 Pac. (2d) 177.

Munn v. *Illinois*, 94 U. S. 113.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

Tyson v. *Banton*, 273 U. S. 418 (1927).

Ribnick v. *McBride*, 277 U. S. 350 (1928).

Nebbia v. *N. Y.*, 291 U. S. 502 (1934).

Triner Corp. v. *McNeil*, 363 Ill. 559, 568.

A. The Fair Trade Act of Illinois is unconstitutional because:

(1) Discriminatory.

(2) Indefinite.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

Connelly v. *General Construction Co.*, 269 U. S. 385, 390.

Cline v. *Frink Dairy Co.*, 274 U. S. 445, 453.

(3) The price fixed is left to the uncontrolled dictates of the producer.

Washington v. *Roberge*, 278 U. S. 116.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

(4) The act covers too much territory.

Tyson v. *Banton*, 263 U. S. 418.

Ingersoll v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030; 89 N. J. Eq. 322, 108 Atl. 128.

Wisconsin Act, Sec. 133.25, Chap. 52, L. 1935.

V.

The statute is an unconstitutional delegation of legislative power to individuals, therefore denying to retailers the equal protection of the laws as well as due process of law.

Cooley—Constitutional Limitations, 8th Ed., Vol. 1, pp. 232-235, pp. 816.

Schechter Poultry Corp'n v. *U. S.*, 295 U. S. 495. (Sec. 133.185 to 133.27 Wis. Stats. 1935.)

Nebbia v. *N. Y.*, 291 U. S. 502.

Nectow v. *Cambridge*, 277 U. S. 72.

Adams v. *Tanner*, 244 U. S. 590.

Burns Baking Co. v. *Bryan*, 264 U. S. 594.

Weaver v. *Palmer Bros. Co.*, 270 U. S. 594.
Baltimore v. *Radecke Co.*, 49 Md. 217.
Yick Wo v. *Hopkins*, 118 U. S. 356.
U. S. v. *Yount*, 267 Fed. 861, 863.
Leeper v. *Texas*, 139 U. S. 462.
Giozza v. *Tierman*, 148 U. S. 657.
Ch. 38, Sec. 598, Ill. Rev. Stats. 1935.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
Triner Corp. v. *McNeil*, 363 Ill. 559, 580.
Ch. 140, Sec. 7, Ill. Rev. Stats. 1935.
Tyson v. *Banton*, 273 U. S. 418.
Horwich v. *Walker Gordon Laboratory*, 205 Ill. 497.
Lippman v. *People*, 175 Ill. 101.
Dr. Miles Medical Company v. *Park*, 220 U. S. 373.
Adkins v. *Children's Hospital*, 261 U. S. 525.

VI.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly irrelevant to any legislative purpose.

Nebbia v. *New York*, 291 U. S. 502, 537, 539.
Nectow v. *Cambridge*, 277 U. S. 183.
Adams v. *Tanner*, 244 U. S. 590.
Burns Baking Co. v. *Bryan*, 264 U. S. 504.
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402.
Schlessinger v. *Wisconsin*, 270 U. S. 230.
Liggett v. *Baldridge*, 278 U. S. 105.
Yick Wo v. *Hopkins*, 118 U. S. 356.
Washington v. *Roberge*, 278 U. S. 116.

A. The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.

(a) The challenged statute unconstitutionally vests in private persons arbitrary power to fix prices at which another may sell his own property.

(b) The legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to grant. The power is too unrestrained and too susceptible of abuse.

Eubank v. *Richmond*, 226 U. S. 137, 143, 144.
Washington v. *Roberge*, 278 U. S. 116, 121-122.
Yick Wo v. *Hopkins*, 118 U. S. 356, 369.

(c) The argument that competition between brands will prevent all arbitrary, unreasonable and discriminatory price-fixing is without merit.

Bourjois Inc. v. *McGowan*, 12 Fed. Supp. 787.
Encylopedia Brittanica; "Publishing".
Federal Trade Comm. Report on Resale Price Maintenance, 1931, p. 157.
"Dangerous Trends under the N. R. A.," Prof. Nystrom, p. 8.

B. The means adopted by the legislature in the challenged statute are wholly irrelevant to any constitutional legislative purpose.

New State Ice Co. v. *Liebman*, 285 U. S. 262, 280.
Meyer v. *Nebraska*, 262 U. S. 390.
Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510.
Buchanan v. *Warley*, 245 U. S. 60.
Schechter Poultry Corp'n v. *U. S.*, 79 Law Ed. 888.

(a) If it be assumed, contrary to fact, that the prevention of the use of "Loss Leaders" is the purpose of the statute, the means adopted for the prevention of such practices are wholly irrelevant to that purpose.

Brookings Institute: "Effect of Abolishing Loss Leaders."

Federal Trade Comm. Report on Resale Price Maintenance, 1931, p. 9.

Tyson v. *Banton*, 273 U. S. 418.

Adams v. *Tanner*, 244 U. S. 590, 594, 595.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1, 9, 10.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

City of Carrolton v. *Bazzette*, 159 Ill. 284, 299, 300.

People v. *Gillson*, 109 N. Y. 389, 399.

(b) If it be assumed, contrary to fact that the prevention of predatory price-cutting (meaning thereby price-cutting with deliberate intent to injure other persons) is the real object of the statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than that fixed by a manufacturer, has transcended the constitutional limits of the legislative power.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

Central Lumber Co. v. *So. Dak.*, 226 U. S. 157.

(c) The constitutionality of this statute cannot be sustained merely because it confines price-fixing to goods bearing the producer's name, trade-mark or brand.

(1) The sole function of a trade-mark is to designate goods as the product of a particular trader and to protect his good will against the sale of another's product as his.

United Drug Co. v. *Rectanus Co.*, 248 U. S. 90, 97, 98.

Prestonettes Inc. v. *Coty*, 264 U. S. 359, 368.

Russia Cement Co. v. *Frauenhar*, 133 Fed. 518.

Gorham Mfg. Co. v. *Emery Bird Thayer Dry Goods Co.*, 92 Fed. 774, aff'd 104 Fed. 243.

Vitascope v. *United States Phonograph Co.*, 83 Fed. 30.

John D. Park & Sons Co. v. *Hartman*, 153 Fed. 24.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373.

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Federal Trade Comm. v. *Beech-Nut Packing Co.*, 257 U. S. 441.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490.

Bauer v. *O'Donnell*, 229 U. S. 1.

Bobbs-Merrill v. *Straus*, 210 U. S. 339.

(2) The constitutionality of the statute cannot be sustained by giving to a trade-mark (or brand or name that is not a trade-mark) a legal effect which in its nature, it cannot have.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

(3) The constitutionality of this statute cannot be sustained under the guise of protecting trade-mark owner's good will.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

New State Ice Co. v. *Liebman*, 285 U. S. 262.

Buchanan v. *Warley*, 245 U. S. 60.

U. S. v. *Hoosac Mills*, 297 U. S. 1.

(4) The constitutionality of the statute cannot be sustained by the argument that a retailer buying branded goods with knowledge of an existing contract between the manufacturer and someone else fixing a resale price on other goods bearing the brand takes subject to the price restriction.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490, 500, 501.

Buchanan v. *Warley*, 245 U. S. 60.

(5) The constitutionality of the statute cannot be sustained by denominating the imposed price restrictions as "equitable servitudes."

Garst v. *Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219.

Park & Sons v. *Hartman*, 153 Fed. 24, 39.

(6) The constitutionality of the statute cannot be sustained by the argument that it merely gives a cause of action against persons inducing a breach of contract.

Lumley v. *Gye*, 2 El. & Bl. 216.

Lamport v. *4175 Broadway Inc.*, 6 Fed. Supp. 923.

Sweeney v. *Smith*, 167 Fed. 385, aff'd 171 Fed. 645, certiorari denied, 215 U. S. 600.

(7) The constitutionality of the statute cannot be sustained on the theory that the statute is reasonable because it gives a cause of action only to a "person damaged."

1 Sutherland, Damages, 4th Ed., Sec. 2, 3.

Buchanan v. *Warley*, 245 U. S. 60.

C. If it be assumed, contrary to fact, that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are wholly irrelevant to the purpose.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 536.

Home Building & Loan Ass'n v. *Blaisdell*, 290 U. S. 398, 442.

Williams v. *Standard Oil Co.*, 278 U. S. 235.

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1.

People v. *Gillson*, 109 N. Y. 389.

New State Ice Co. v. *Liebman*, 285 U. S. 262.

Tyson v. *Banton*, 273 U. S. 418.

Sears, Roebuck Co. v. *Federal Trade Comm.*, 258 Fed. 307.

Sinclair Refining Co. v. *Federal Trade Comm.*, 276 Fed. 686, aff'd 261 U. S. 463.

S. S. Kresge Co. v. *Champion Spark Plug Co.*, 3 Fed. (2d) 415.

Dr. Miles Medical Co. v. *Park*, 220 U. S. 373.

Boston Store v. *American Graphophone Co.*, 246 U. S. (8).

Federal Trade Comm. v. *Beechnut Packing Co.*, 257 U. S. 441.

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490.

Brooking's Institution Survey.

ARGUMENT.

A.

The Illinois Fair Trade Act deprives the defendant and appellant retailer of liberty and property without due process of law, and denies to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

I.

1. The basic statute—its analysis—gist of plaintiff's cause of action.

A. The nature, purposes and reasons for the enactment and legislative history of the statute is found in the attempt to destroy alleged predatory price cutting.

The legislative history of the Illinois "Fair Trade Act" taken from No. 23—Final Legislative Synopsis & Digest of the 59th General Assembly of Illinois, is as follows:

> "Senate Bill 598 (Searcy)
>
> Provides that certain contracts regulating resale prices of certain commodities which bear a trade mark, brand or name of the owner, named thereon, shall be valid and binding on the contracting parties. Any sale, offer of sale, or advertisement of sale, at less than such contract price is unfair competition

and actionable at the suit of any person damaged thereby. Act to be known as 'Fair Trade Act'.

1935—June 4. Introduced. 1st Reading. Without Reference.
June 5. 2nd Reading.
June 11. 3rd Reading. Further consideration postponed.
June 12. Passed.
June 12. House.
June 17. 1st Reading—Committee on Judiciary.
June 21. Committee discharged. Placed on Calendar.
June 26. 2nd Reading.
June 28. 3rd Reading. Passed.
July 8. Approved."

The Act became a law within less than a month of the date of its introduction in the Senate as a bill, and without any legislative hearings upon the bill. There is no legislative finding in the staute, and it does not appear that the legislature made any official investigation into any of the conditions, which are claimed to have given rise to the legislation.

In *Nebbia* v. *N. Y.*, 291 U. S. 502 (1934), wherein the price fixing features of the New York milk control law were held constitutional by this court, it was noted that thirteen public hearings had been held before the passage of the law, resulting in a report covering "463 closely printed pages." This court said at p. 516:

> "The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions."

This Act legalizing, as it purports to do, the making of resale price agreements, and revolutionizing the prior

public policy and the common law as it existed in this state, and as it now exists in the field of Federal law, is deserving of inquiry as to its historical origin and background. The "Fair Trade Act" is the result of an effort to hasten by legislation the day when developments in the field of unfair competition must no longer await gradual mutations in the judicial concept of fair trade. Within the last few years, there has been steady development toward that end.

The model of the "Fair Trade Act" is found in the oft-proposed Capper-Kelly "Fair Trade Act," (S. 97, 72nd Cong. 1st Sess.; H. R. 11, 72nd Cong. 1st Sess.) wherein it was proposed that contracts providing that a vendee is not to sell at lower than stipulated prices and is to exact a similar agreement from sub-vendees, would be valid. The proposed act, as does the Illinois law, applies only to trade-marked or branded commodities in fair and open competition with similar goods, and forbids discrimination between dealers of the same class. This latter provision is noticeably absent from the Illinois law. Resale below the stipulated price in closing out a line of goods, disposing of damaged or deteriorated articles, and in liquidation by an officer acting under the orders of a court, provided that the original vendor refused to repurchase the goods are likewise therein contained.

The bill was enacted by the House, but the Senate Committee on Interstate Commerce reported it without recommendation and it was lost. (76 Cong. Rec. 843-44, 948, 952 (1932).)

A similar law was recently passed in New York and some other eight states, as well as Illinois.

The Statute.

The Act is entitled as follows: "An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." It was approved July 8, 1935.

8. "UNFAIR COMPETITION. Trade Mark—Provisions against resale—Validity of contract. Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

9. WHAT CONSTITUTES UNFAIR COMPETITION—Action.

§ 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 10.—Application of Statute. (3) This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 11.—Short Title. (4) This Act may be known and cited as the 'Fair Trade Act'."

(a) The economic point of view.

From an economic point of view, the Illinois Fair Trade Act represents a reversal in theory as to the most adequate means of protecting the public.

The Illinois Fair Trade Act, says Justice Wilson, speaking for the Illinois Supreme Court in *Triner Corp.* v. *McNeil,* 363 Ill. 559, at 569, was enacted in order to extinguish the practice of retailers in using "loss leaders". It refers to the practice whereby the retailer advertises a leading article, the regular price of which is well known, for special sale at extremely low figures—usually, a losing one to him—thus inveigling customers to his store and at the same time instilling in them the belief that the remainder of his articles, which are not so well known, bear the same advantages as to price and quality.

The theory of this court, and that of the Supreme Court of Illinois, that competition unrestrained was the public's surest protection of fair prices and good quality has been in part departed from by the Act in question. Where

formerly it was held that restriction of prices tended toward monopoly, with the ultimate result that the public was forced to accept goods at a dictated price, under the Illinois Fair Trade Act, competition is curtailed between retailers as to the sale price on the article of a single brand. The swing away from the original theory is not complete, in that competition between the different brands of commodities is retained.

One school of economists assert that "cut throat competition" leads to monopoly, as well as the control of prices. The survivor of the ruthless battle finds himself in a position to fix a price at will. It is claimed the public is injured through "loss leaders" because their use leads to higher prices generally and to the sale of goods of inferior quality. The loss is offset, it is said, through increasing prices on other articles as much in demand by the public.

The Illinois Supreme Court in upholding the statute says that the statute is not a price-fixing statute, in adopting the California case concept expressed in *Max Factor & Co.* v. *Kunsman,* 55 Pac. (2d) 177, and goes on to state "that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." (363 Ill. 559, 568.) The purpose of the statute, its necessary effect and the reasons for its enactment were to prevent prices from being fixed by the usual forces of the market, and by "the ordinary play of fair and honest competition between manufacturers of similar products." The plaintiff in this action seeks just one thing, namely, to compel the defendant to sell its own property at a price fixed by the plaintiff in a contract wholly between it and a stranger, and to prevent the defendant from selling its own goods at a price fixed by "the ordinary

play of fair and honest competition between manufacturers of similar products."

Again the Supreme Court of Illinois (363 Ill. 559, 582) asserts: "No question of governmental price-fixing is, in consequence, involved." This is true, but the statute is nevertheless a price-fixing statute; for the Government has attempted to delegate to private persons the power to fix the selling price of practically every ordinary commodity sold by every ordinary business. In fact, the present statute is worse than one under which governmental agencies would fix prices. We might at least hope that Government officials whose acts are hedged with protective restrictions and restraints of official duty, and whose decrees are subject to judicial review, would be less arbitrary than would the private persons in whom this statute vests unrestricted and unreviewable power over the property of others.

Mr. Henry Ford, in a brochure of the Chemical Foundation, Inc., entitled The Only Real Security, No. 7, *American* Political Economy, states the objection from that standpoint in a nutshell:

> "The financers and the Government have still another point in common. Production with them is a secondary thing and not the main thing. Therefore, when they get into management, they always start to talk about the evils of competition and try to devise ways and means to limit competition. It is something that either is or is not. Barring competition is only a way of bringing in price fixing, and price fixing is not only the refuge of the incapable man but also a stone wall across the path of progress. Of course, much that goes on under the name of competition is not competition but racketeering. The competition of quality and service is the only thought worthy of the name."

Price fixing is the antithesis of competition, fair or otherwise.

The statute is not confined to predatory price cutting or the abolition of "Loss Leaders", for it permits producers to foist even exhorbitant price standards upon retailers to the detriment of the public. The statute has no "penal teeth", for no provisions are made for its uniform enforcement; but producers at their pleasure are permitted to obtain relief against whatever violators they see fit. Non-contracting parties, bound by contracts to which they are not parties, must at their peril select which contract they will be bound by and abide, for the statute says they are to obey "any contract".

(b) The Gist of Plaintiff's Alleged Cause of Action.

Stripped of all technicalities, the case comes down to this: A man owns a book, a barrel of flour, a sack of coal, a jar of cold cream or any other article. The article has been lawfully purchased for $1.00. The article bears the producer's name or brand. The brand may have been in use only a week or only a day. It may not even be entitled to protection under the Trade-mark Law. The owner of the article has made no contract with anyone affecting the resale price of the article. He has induced no breach of contract. He has been guilty of no fraud. He seeks to sell the article at a price of his own choosing, say, $1.98. He has a customer who needs the article and wishes to buy at that price. The manufacturer and competing retailer then step in and say to the owner of the article: "We have made a contract, not with you but between ourselves, that such articles bearing the manufacturer's brand or name shall not be sold below $2.50 or whatever other price the manufacturer chooses to stipu-

late in a contract to which you are not a party. Although you own the article, the legislature has given to us the power to fix, in our discretion, the price below which you may not sell your own property. It makes no difference that you lawfully own the property. It makes no difference that you paid the full price exacted by the producer who fixed that price for the branded article; or that after the purchase you had all the risks of ownership, resale, deterioration, theft, fire, storage, etc., and that neither the producer nor the competitor assumed any of these. It makes no difference that you can sell it at 98 per cent profit and that price is all that your customer can afford to pay. If you sell for less than $2.50, or for even one cent less than any other price which the manufacturer chooses to stipulate in a contract to which you are not a party, you will be mulcted in damages or enjoined because the legislature has given to us the entire judicial and executive power of the state to enforce our will over that property which you bought. Our reason for fixing the price at $2.50 is none of your business. Likewise, our reason for proceeding against you and not proceeding against some other retailer is none of your business. You will sell the property for which you paid the full price for at least $2.50 or you will not sell at all."

This is what the statute does and was intended to do, notwithstanding attempts to put it in a more flattering light, and to describe it in more unrealistic terms.

What the statute actually does, we submit, is the vital thing to bear in mind in determining the question presented. Basic constitutional rights of liberty and property are realistic and substantial. They are not to be whittled away by metaphysical refinements or specious analogies.

By the nature of the decree herein, and the opinion of the Supreme Court of Illinois, 363 Ill. 610, it is apparent that we are concerned only with the constitutionality of the second section of the "Fair Trade Act", and the matter of any contractual relationship between the parties hereto is not before this Court. The decretal part granting the issuance of the injunction provides that the defendant be forever enjoined and restrained by the Court from wilfuly and knowingly advertising, offering for sale or selling any of the plaintiff's branded merchandise known as Seagram's Products in the State of Illinois, "at less than the prices stipulated by Seagram-Distillers Corporation, a corporation, plaintiff herein, from time to time under the 'Fair Trade Act' of the State of Illinois, in accordance with the terms and provisions of contracts made pursuant to said 'Fair Trade Act' between plaintiff and its Distributors or between plaintiff and Retailers, which contracts, at the time of filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any said beverages in the State of Illinois." (R. .....)

The Supreme Court of Illinois, 363 Ill. 610, 614, said:

> "We are not concerned with the claim that the contract between plaintiff and defendant * * * is invalid * * *. Section 2 of the Fair Trade Act applies to wilfully and knowingly advertising, offering for sale or selling any commodity at less than the prices stipulated in any contract entered into pursuant to the provisions of section 1 of the act whether the person so doing is or is not a party to such contract."

We have here by the mandatory injunction of the Court a specific performance of the second provision of the "Act" relating to resale prices. The defendants are not enjoined from breaching any alleged contract with the plaintiff; they are enjoined from selling their mer-

chandise at prices other than those stipulated in the contracts between plaintiff and others, to which the defendants are strangers. The provisions of the decree for, and the decision of the Illinois Supreme Court clearly show that it is under and pursuant to the second section of the "Fair Trade Act" that the defendants are bound.

Analysis of the Statute.

The first section of the "Fair Trade Act" legalizes price maintenance contracts and relates to resale agreements, while the second section of the "Act" relates to resale prices. The decree herein indicates that the Court desired to and did enforce obedience to the resale prices fixed by the plaintiff and others, by requiring the defendants to sell the merchandise for not less than these fixed resale prices. There is no provision in the decree binding them to comply with the provisions of any alleged agreement relating to resale prices had with the plaintiff.

The language of the "Fair Trade Act" authorizes a vendor to stipulate that the immediate vendee shall not resell the article under contract except at the stipulated price. A liberal reading of subsection 1 of section 1 of the "Fair Trade Act" shows that the legislative intent probably was to restrict this provision to prices set by the producer, whereas a literal reading of the section would permit the stipulation for resale prices to be made by the vendor whether he be producer, wholesaler, or jobber. The producer usually determines prices for wholesalers and retailers, but if he only sets the wholesale price and the wholesaler is not bound by a resale agreement, then these wholesalers may, under the "Fair Trade Act," fix resale prices to subsequent vendees. We would thus have a number of conflicting retailer's prices.

Subsection 2 of section 1 provides for the binding of vendees other than immediate purchasers by the provisions of the agreement to maintain designated prices, the said subsequent vendees not being in contractual relationship with any of the parties to the resale agreement. The immediate vendee of the producer may have included in the contract that all others of the same marketing status will be bound by similar resale agreements. The "Fair Trade Act" allows this privilege of exacting agreements concerning resale contracts only to the "producer or vendee," and other persons are not covered. The owner of a trade-mark may not produce the commodities himself. They may be purchased from a producer. Injury to the trade-mark will, therefore, affect the owner rather than the actual producer.

To protect his trade-mark, the owner could require resale agreements from his vendees. They could refuse to enter into the resale agreements and they could not compel him to agree not to sell to other dealers unless resale promises were likewise exacted. From a reading of the "Fair Trade Act," it is apparent that the legislature has covered only the situation in which the owner of the trade-mark and producer are one and the same. There is an ambiguity in section 1 by the confusing use of the words "buyer", "vendee", and "purchaser".

In order to avoid all these complications, the testimony in this case having shown that the plaintiff had entered into resale agreements with others both distributors and retailers fixing resale prices, the defendants and all other retailers would be bound under subsection 2 of section 1 of the "Fair Trade Act" without their being in direct contractual relationship with the plaintiff. All the troublesome questions as to the right of the plaintiff to initiate resale price fixing agreements are

avoided, as are also the complications hereinbefore next immediately described.

The Illinois "Fair Trade Act" does not expressly repeal that portion of the existing Anti-Trust Act, to-wit: C. 38, Secs. 598, 602, Ill. Revised Statutes, 1935, which makes the entering into agreements to regulate or fix the prices of articles a criminal conspiracy, and declares any contracts attempting to accomplish this purpose invalid. There is nothing in the "Fair Trade Act" to indicate that the Anti-Trust Act is expressly repealed. Such repeal can only be had by implication from the "Fair Trade Act."

C. Constitutional Aspect of the Statute.

In considering the constitutionality of the statute we call attention to the following facts:

1. The statute is a private price-fixing bill. A manufacturer (or any "vendor" who may or may not be the manufacturer) is given the power to fix the price at which another person may sell his own property.

2. This power to fix the selling price of another's property is given to the manufacturer irrespective of any consent or agreement thereto by the owner of the property.

3. The power may be exerted over any article of commerce, provided only that it bears a brand or trademark, or even the manufacturer's name.

4. The price may be fixed in the absolute and uncontrolled discretion of the manufacturer for any reason or for no reason. It may be fixed high or low or anywhere in between. It may be fixed capriciously, arbitrarily or unwisely. It may be fixed because of mistake, ignorance or malice. It may be imposed or with-

drawn as the manufacturer, in his uncontrolled discretion, chooses. It may be changed when a manufacturer wills and as he wills. There are no standards or limitations prescribed by the statute. Once a manufacturer fixes a price, his will has the force of law if he, or some competing retailer, chooses so to regard it.

5. Prices are not fixed by the legislature or by an impartial state officer or body after due notice and hearing, but by private persons. No public body supervises the prices fixed. Neither the owner of the property nor the consumer (the persons most affected by price-fixing) is given any opportunity to be heard, much less any voice in fixing the price. No body, either judicial or administrative, can review the price fixed by the manufacturer.

6. Not only are private persons given the power to fix the prices at which another person may sell his own property, but private persons are likewise given unlimited and absolute discretion as to the enforcing of the fixed price. Failure to observe the fixed price is not made a crime, nor is the fixed price enforced by any state body or officer. The manufacturer or a single retailer (who, as in this case, may be in competition with the defendant) may proceed or not proceed against such retailer as he chooses. He may act for any reason or for no reason, capriciously, maliciously or unwisely and he may favor one retailer over another. By proceeding against a certain retailer and not another, he may drive the former from business and favor the latter. The act gives to private individuals the power of economic life and death over retailers.

7. There is no requirement that a uniform price be fixed. A manufacturer may enter into innumerable contracts each fixing a different price with respect to the

same sort of article. The statute, nevertheless, gives to private individuals the power to compel retailers who never signed any contract to observe the price fixed in "any contract".

8. The statute purports to give price-fixing powers to manufacturers whose products are "in fair and open competition" with commodities of the same general class produced by others; but it prescribes no standard or guide and no means for determining when a product is in fair and open competition with commodities of the same general class. A retailer who purchases a given article, and is not a party to any price-fixing contract, must determine at his peril and with no prescribed means of ascertainment whether he is free to sell the article at a price of his own determination, or whether he is bound by a price fixed by another.

9. There is no requirement that the contract be in writing; or that the price be filed in any public or other place. A manufacturer or a competitor need merely say that a particular price has been fixed, and the retailer who may have a large stock of the article on hand must determine the truth as best he can, without any adequate means of verification, and then proceed to sell or not to sell at his peril.

10. The statute is not a prohibition upon sales below cost. The statute prescribes sales of one's own property below a price fixed by another, and it is wholly immaterial that the person seeking to sell his own property seeks to sell it above cost, at a handsome profit to himself, with every economic justification and for the only price that his customer can afford to pay.

11. The statute is not a prohibition of price cutting with an intent to injure or destroy a competitor. Selling

one's own property below the price fixed by another is prohibited, even though the owner acts with the best possible motives and is seeking only to conduct his business and meet competition in a way that has always heretofore been regarded as fair and honorable, and which has in fact been required by our anti-trust laws.

12. The statute is not confined to the protection of the good will attaching to an established trade-mark, brand or name. A producer of unbranded goods may overnight acquire unlimited price-fixing powers merely by putting a name or brand on his product, and this power will extend over his products after he has parted with title thereto, and they have come into the hands of owners who never signed any price-fixing contract. It is not necessary that the brand or name should previously have enjoyed any good will or that it will hereafter enjoy any good will.

It may be one of ten thousand brands of canned fruit or vegetables on which not one cent of advertising has been spent, and as to which there is in fact no more identification in the public mind than there is in the unbranded article.

13. The statute is not confined to any paramount industry which, for special economic reasons, requires special regulation. Under the statute the price of every ordinary article sold by every ordinary business may be fixed.

14. The statute permits private persons to fix retail prices regardless of the locality in which the retail sales take place. A merchant in Farmer City, Illinois, may be compelled to observe the price fixed by a contract between other persons in Peoria, and a merchant in Metropolis, Illinois, may be compelled to sell at a price fixed by a contract between other persons in Chicago.

15. Private persons are given the power to fix the price at which a retailer must sell, regardless of the services and facilities which he furnishes to his customers. No matter how efficiently a retailer may operate, he is to be prevented from passing on to his customers the advantages of his efficient operation. Although a retailer furnishes fewer services and facilities than his competitors, under this statute he is obliged to charge the same price as his competitors, although his customers do not desire and perhaps cannot afford to pay for elaborate services and facilities.

16. The statute is not, and does not purport to be, an emergency measure.

17. The phrase "articles of standard quality" in the title of the statute is vague, indefinite and uncertain. The title of the "Fair Trade Act" states the legislative purpose is to control the distribution of "articles of standard quality under a trade-mark, brand or name." The text of the act omits the qualifying words "standard quality". The Act, to accomplish its purpose, must effectuate the phrase contained in the title. The statute is productive of great hardship because the commodities, whose prices are fixed, may fluctuate in quality. The prices would fluctuate concomitantly with similar fluctuations in quality. Different contracts fixing the prices would be successively consummated. Where prices increased by reason of improvements in quality, the retailer would be compelled to ask higher prices for inferior products manufactured prior to the improvement in quality. The legislature anticipated this contingency by permitting in the title, price fixing only in the matter of "articles of standard quality." This important element of the statute is disregarded in its body.

Standard quality is not defined by the law. Whether its determination shall be left to the producer, distributor, owner, vendor, vendee or the public, so that its price may be fixed, is left to conjecture and speculation.

The statute is silent as to the time the standard is to be determined, whether at the time of the effectiveness of the statute, the entry into a contract of sale, or the time of sale.

If new contracts are entered into upon improvements in quality, the inferior articles on hand will have to be marked up to and sold at the increased price. The retailer is at the mercy of the dictates of the producer in these contingencies.

18. The "Fair Trade Act" furnishes no guide or test to determine when an article is in "fair and open competition" or when there are commodities "of the general class."

19. The retailer is enjoined from advertising, offering for sale or selling "any commodity at less than the price stipulated in any contract entered into pursuant to Section 1 of this act whether the person so advertising, offering for sale or selling is or is not a party to such contract." The commodity is not limited to the one covered by the contract.

20. The statute is carelessly drawn and is so replete with vagueness, indefiniteness and uncertainty that no person, including (defendant) appellant, can possibly hope to arrive at a clear and intelligent understanding as to what duties have been imposed upon him by the statute. The law is not definite and certain enough to enable every person by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. It denies due process of law. (*Champlin*

Refining Co. v. *Comm.*, 286 U. S. 210.) There is a total lack of reasonable standards in the statute, *i. e.*, no method of fixing prices, no requirement that they be uniform, no requirement that non-assenting parties follow any particular contract; no standard adjustable to particular conditions in given localities.

(1) Constitutionality.

Historical Background:

Producers, on their own initiative, sought to establish a resale price maintenance system for the sale of their commodities with which all vendors should comply, by the use of interlocking contracts long before the passage of legislation similar to that challenged here.

This Court in *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373 (1911) held such a system bad at common law because:

(1) It places a restraint on the alienation of the articles, and

(2) The producer having sold his products at prices satisfactory to himself, the public was entitled to whatever advantages could be derived from competition in the subsequent traffic, and

(3) The attempt to fix prices on future sales violated the provisions against restraint of trade and monopoly in the anti-trust law. (Act of July 2, 1890, C. 647, 26 Stat. at L. 209, 15 U. S. C., Par. 1.)

Neither the patent or copyright laws give the right to fix resale prices, and contracts making such attempts were held violative of the general law making the same void.

Patent cases:

Boston Store v. *American Graphophone Co.*, 246 U. S. 8.

Victor Talking Machine Co. v. *Kennedy*, 271 Fed. 810 (C. C. A. (3d) 1921).

Copyright case:

Bobbs Merrill Co. v. *Straus*, 210 U. S. 339.

The Illinois legislature and the Supreme Court now declare such contracts valid. The barrier of the common law rule and the state anti-trust law is removed.

(2) The constitutionality of the statute is not established by the opinion of certain economists that price-fixing is socially desirable, or by the legislative opinion that it is socially desirable.

The dominant theme of the argument for the validity of the statute is that the legislature can adopt whatever policy it desires for social improvement, if that policy has some respectable economic opinion behind it.

The argument obscures the real question before the Court, which is not one of economic or social theory, but one of constitutional limitation upon legislative power.

The opinions of economists were mustered in support of the National Industrial Recovery Act, and were adopted by Congress, but the Act was held unconstitutional by this Court in *Schecter* v. *United States*, 295 U. S. 495, 79 L. Ed. 888. Mr. Chief Justice Hughes, speaking for the unanimous Court, said (p. 905):

"It is not the province of the Court to consider the economic advantages or disadvantages of such a

centralized system. It is sufficient to say that the Federal Constitution does not provide for it."

Similarly, economic opinion was called upon to support the Railroad Pension Law; yet the Supreme Court, in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, held the act unconstitutional as transcending the constitutional powers of Congress. Mr. Justice Roberts, in delivering the opinion of the Court, said:

> "Even should we consider the act unwise and prejudicial to both public and private interests, if it be fairly within delegated power, our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results; if its provisions go beyond the boundaries of constitutional power we must so declare."

We have no doubt that economists' opinions could be gathered in support of the legislation that was condemned in each of the numerous cases in this Court. We have no doubt the opinions of economists, political writers, sociologists, etc., could be quoted in great number to support a statute completely abolishing private property. The abolition of private property may or may not be socially desirable. But one thing is certain: So long as we have a constitution which prohibits the deprivation of life, liberty or property without due process of law, such a statute is unconstitutional, no matter how many economists proclaim it socially desirable.

The arguments advanced might be appropriate before a constitutional convention considering a change of our fundamental institutions. These arguments are wholly irrevelant to a consideration of the question before this Court, which is, has the legislature, under our existing constitution, power to permit a private person, in his sole

and unfettered discretion, to dictate the price at which another person must sell ordinary commodities which he owns?

Whatever economists may envisage as an Utopian social order, under our system of constitutional government, the legislature cannot give to private individuals this unlimited power over the lives and property of other people.

II.

The two sections of the "Fair Trade Act" are interdependent and part of one legislative system designed to accomplish one object, i. e., the elimination of price cutting. If either subsection is unconstitutional, the whole act fails.

The Illinois "Fair Trade Act" does not contain a severable clause. The purpose of the "Act" is to prevent and eradicate alleged predatory price cutting. This is the sole purpose of the legislative enactment.

In the case of *Carter* v. *Carter Coal Co.*, Vol. 80, No. 15, pages 749-788, United States Supreme Court (Law. Ed.), Advance Opinions, this Court held the Bituminous Coal Conservation Act invalid. It here said, even though the act, unlike the Illinois statute, contained a severability clause, that in the absence of a legislative declaration that the invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety, so that if any provision is unconstitutional, the remaining provisions fall with it. This Court said:

> "The price fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the

matter, nor anything we have said, is to be taken as indicating that the Court is of opinion that these provisions, if separately enacted, could be sustained."

In the case of *Winter* v. *Barrett*, 352 Ill. 441, it was held that if the purposes of an act are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them. As we have heretofore explained, the legislature sought to accomplish the elimination of predatory price cutting by permitting resale agreements in subsection 1 and resale price fixing in subsection 2 of section 1 of the "Act". Both sections are interdependent and neither standing alone is capable of effectuating the legislative will as expressed in the statute. The statute is designed to accomplish a single purpose. It provides an entire system for the eradication of the evil described in the title. If any one of its provisions are invalid, the whole statute is invalid, in other words, if one section is good and the other bad, both must fall together.

Plaintiff and the Supreme Court of Illinois takes the position that subsection 1 of the "Fair Trade Act," merely seeks to give value and restates the common law of Illinois as to contracts entered into pursuant to the section, by providing in subsection 2 of the Act a remedy against those who knowingly sell for less than the stipulated price. In this remedy, they say, lies the sole change which the statute has introduced. The intent of the legislation is

then made obvious in that it is not the enforcement of a mere price maintenance contract the statute alone seeks, but also compliance with these contracts by non-assenting third persons. Section 2 is the novel and important introduction.

Thus it is readily seen that subsections 1 and 2 of the Fair Trade Act stand together; they form one logical, coordinate whole. Subsection 2 fortifies and buttresses subsection 1; without it subsection 1 is stripped of its economic effectiveness. The two sections together yield the same result as the already sanctioned agency method, but with an assurance of narrower competition, greater cost, and hence higher prices to the consumer.

Mere knowledge of the contract on the part of the price cutter is not sufficient to warrant the granting of relief against him. *Garst* v. *Hall & Lyon & Co.*, 179 Mass. 588 (1901).

There is no clause in the "Fair Trade Act" to the effect that if any provision thereof is declared unconstitutional, it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. It stands or falls as a whole.

In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio* v. *Hoboken*, 69 N. J. L. 649, 662, where the New Jersey Court of Errors and Appeals, in an opinion delivered by Judge Pitney (afterwards a Justice of this Court) after setting forth the rule as above, said:

> "In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise

valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the Act substantially unaffected by the process."

III.

The Illinois "Fair Trade Act" deprives retailers of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

A. Constitutional Principles.

(a) "* * * nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Constitution of the United States.

(b) The right to buy, sell, barter and exchange property and to fix the price at which one's own property shall be sold is an inherent right of the property itself and subject to the due process clause of the Federal Constitution.

"The right of the owner to fix the price at which his property shall be sold or used is an inherent attribute of the property itself. * * * (citing cases) and as such, is within the protection of the Fifth and Fourteenth Amendments." (*Tyson* v. *Banton*, 273 U. S. 418, 429.)

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property * * * (citing cases). Property consists of the free use, enjoyment and disposal without control or diminution save by the law of the land." (*Buchanan* v. *Warley*, 245 U. S. 60, 74.)

Likewise, a person's "business is a property right * * * and as such is entitled to protection against state legisla-

tion in contravention of the Federal Constitution." (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111.)

(c) The "liberty" protected by the due process clause embraces more than freedom from physical restraint. It includes freedom to contract and to pursue a lawful calling.

> " 'The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' " (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 589.)

(d) The fundamental rights guaranteed by our organic law cannot be abridged or curtailed by legislative action unless there are "special circumstances" justifying such action. A general restraint affecting all businesses of a private nature is not justified.

In *Nebbia* v. *New York*, 291 U. S. 502, 503, this Court recognized that restrictions upon the private control of one's own business and of one's own property are the exception, rather than the rule, and speaking by Mr. Justice Roberts, said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free from governmental interference."

In *New State Ice Co.* v. *Liebman* (285 U. S. 262, at 277), this Court said:

> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity

> of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker or the tailor each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use * * * and this court has definitely said that the production or sale of food or clothing cannot be subject to legislative regulation on the basis of public use."

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 537, this Court, per Mr. Chief Justice Taft, said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product, or his wages could be fixed by state regulation."

(e) Freedom from restraint in the use of one's property and of one's liberty being the general rule and restraint the exception, under what circumstances may the legislature curtail the freedom of the citizen and the free use of his property? The answer, as deduced from the cases hereinafter cited, is that under our system of constitutional government, restrictions upon the liberty and property of our citizens cannot be imposed by legislative enactment unless the enactment (a) is for the purpose of protecting the public health, morals, safety or welfare; (b) does not operate in an arbitrary, unreasonable or discriminatory manner; and (c) provides means which are appropriate to achieve the statutory purpose.

B. Since the effect and purpose of Section 2 of the statute is the fixing of prices on ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the legislature.

There is not and cannot be any claim by the proponents of this statute that it was enacted for the purpose of protecting the public health, morals or safety. The plaintiffs and the Illinois Supreme Court do, however, seek to sustain the statute as an enactment to protect the public welfare. The statute cannot be so justified.

This statute is not confined to any specific industry upon which, for special reasons, the public welfare depends. It is a general price fixing grant to private interests.

The prices charged for ordinary commodities by persons engaged in ordinary businesses cannot be regulated under the guise of protecting the public welfare. Businesses "affected with a public interest," such as railroads, grain elevators, public utilities, banks, insurance companies and warehouses, may be subject to regulation in the prices charged for the commodities sold or the services rendered by them. In periods of economic stress and emergency, other businesses which are singled out as occupying a unique position in our economic system and the condition of which at such time of stress and emergency jeopardizes the general prosperity of the community, may be subject to regulation. For example, rents may be temporarily regulated during a housing shortage, and the prices of an essential commodity, such as milk, may be regulated when the milk industry, which is essential to the well being of the people and to the credit of the State, is threatened with extinction due to an economic emergency.

Here, the statute in question is not confined to businesses affected with a public interest or to paramount businesses which call for temporary regulation due to economic emer-

gency. The statute provides that no one may sell his own property regardless of its nature, if it bears a manufacturer's brand or name, except at a price fixed by someone else. Every business, whether it is major or minor, and regardless of its economic condition or importance, falls within the scope of this statute.

There is no legislative finding or even suggestion that all businesses are threatened with extinction because certain retailers sell at prices other than those fixed by manufacturers. The general prosperity of the community is not imperiled because a retailer sells a package of razor blades, a bag of flour, a book, a bottle of whiskey or any other ordinary commodity for less than the manufacturer's arbitrarily fixed price.

Time and again the Illinois courts and the Federal courts have held state statutes purporting to regulate the prices of commodities sold by ordinary businesses unconstitutional. Moreover, the very cases which have upheld statutes regulating prices under certain circumstances have emphasized the special circumstances in the particular industry calling for such regulation, and they have expressly stated that price regulation of ordinary commodities sold by ordinary businesses contravenes the constitutional guaranties of our citizens.

In the following cases, state statutes purporting to fix the selling price of ordinary commodities and services were held invalid as transcending the constitutional limitations on legislative power.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522 (Wages).

Tyson v. *Banton,* 273 U. S. 418 (price of theater tickets).

Fairmont Creamery Co. v. *Minnesota,* 274 U. S. 1 (price of cream).

Ribnick v. *McBride*, 277 U. S. 350 (fees of an employment agency).

Williams v. *Standard Oil Co.*, 278 U. S. 235 (price of gasoline).

People v. *Gillson*, 109 N. Y. 389 (price of food).

People v. *Steele*, 231 Ill. 340 (price of theater tickets).

See also:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277, *et seq.*

In *Ribnick* v. *McBride*, 48 Sup. Ct. Rep. 545, this Court held that a New Jersey statute, conferring on the commissioner of labor power to fix prices which an employment agent shall charge for its services, was unconstitutional as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The constitutional principle that the Legislature is without authority to fix the selling price of ordinary commodities is well summarized by the court in this case, as follows:

> "Under the decisions of this court *it is no longer fairly* OPEN TO QUESTION THAT, AT *least in the absence of a grave emergency*, * * *, *the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power.*" (Italics ours.)

In *United Theatre Offices, Inc.*, v. *Banton*, 47 Sup. Ct. Rep. 426; 273 U. S. 418, this Court held a New York statute, forbidding the sale of any ticket at a price in excess of 50 cents more than that printed on the ticket was unconstitutional and void, for the reason that it likewise violated the Fourteenth Amendment.

In *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893 (1927), this Court held a statute of Minnesota forbidding under penalty, creameries to purchase cream at

higher prices in one locality than in other localities after allowance for the difference in cost of transportation, unconstitutional, as impairing the private right of freedom of contract guaranteed by the Fourteenth Amendment to the Federal Constitution, although the high bidding tended toward monopoly, since the statute had no reasonable relation to such bidding, previously regarded as beneficial to the public.

Mr. Justice McReynolds, speaking at page 896, 7:

> "* * * The statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. *Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.*
>
> "The real question comes to this: May the state, * * * inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse." (Italics ours.)

The statute involved in the Fairmont case was in many respects similar to the statute involved in the instant case.

There, as here, the statute sought to compel observance throughout the state of a unit price fixed by private contract in a single transaction. There, as here, the proponents of the statute sought to justify its constitutionality by asserting that it was necessary to preserve free and fair competition. It will be observed in this case that the price fixed as standard was the price fixed, not by any governmental agency, but by individuals. The case completely answers the strange argument that price fixing by the Government is invalid, but private price fixing is constitutional.

In each of the foregoing cases the constitutionality of the legislation in question was sought to be upheld under the guise of protecting the public welfare. In those cases, as in the case at bar, arguments as to the elasticity of police power were pressed upon the courts. The courts, however, with firm unanimity have refused to uphold statutes which in fact fix the selling price of ordinary commodities and services.

Public welfare does not require such a regulation of private business. Our courts have not been blind to the fact that the public welfare is best subserved by leaving our citizens free to manage their own private affairs and to use and dispose of their own property on their own terms.

In businesses affected with a public interest and in other paramount businesses in times of emergency, prices may be regulated, but not otherwise. The class of businesses subject to regulation may be expanded by special circumstances, but so long as principles of constitutional law are observed, the legislature, at least in the absence of grave emergency, cannot compel the butcher, the baker, and the candlestick maker, the artisan, the merchant and the manufacturer to sell his commodities or services in the ordinary course of his business at prescribed prices. Much less can the legislature delegate to private individuals the power

to fix the price at which another person may sell his own property.

Indeed, the very cases which have upheld legislative price regulation because of special circumstances or emergency threatening a particular industry, by their rationale and language clearly indicate that price regulation of all ordinary businesses cannot be justified upon any constitutional principles.

See:

People v. *Nebbia*, 262 N. Y. 259, 264, 265.
Nebbia v. *N. Y.*, 291 U. S. 502, 523, 526.
German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.
Block v. *Hirsh*, 256 U. S. 135, 137.

In *People* v. *Nebbia*, 262 N. Y. 259, Chief Judge Pound, speaking for the Court, held that the legislature because of "special circumstances" in the milk industry, might fix minimum prices for milk, but he specifically stated (pp. 264, 265) that the power so to fix prices "may not be invoked when we are dealing with an ordinary business, essentially private in nature."

In the same case in this Court, Mr. Justice Roberts said (291 U. S. 502, 523):

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference."

And at page 526:

> "It results that regulation valid for one sort of business or any given circumstance may be invalid in another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon relevant facts."

Similarly, in *Darweger* v. *Staats*, 267 N. Y. 290, Chief Justice Crane, in referring to the claim of counsel that the Nebbia case was "authority to sustain legislation fixing the price of any commodity—shoes, clothes, coal, hardware, or anything else that might strike the legislature's fancy, provided an emergency be declared," stated (p. 308):

> "To say that the Nebbia case is authority for the legislature to fix the prices of all commodities is not justified by the decision."

Both the New York Court of Appeals and this Court in upholding the constitutionality of a New York statute regulating the charges of grain elevators (a business clearly affected with a public interest) again emphasized the fact that price regulation was not applicable to business generally. Judge Andrews, speaking for the Court of Appeals, in *People* v. *Budd*, said (117 N. Y. 1, 27):

> "We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

Mr. Justice Blatchford, speaking for the Supreme Court of the United States, expressly approved of the foregoing statement by the New York Court of Appeals (see 143 U. S. 517, 532).

In *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 414, the Court, in upholding the constitutionality of a state statute regulating insurance rates, said, per Mr. Justice McKenna (p. 414):

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequently beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted."

In *Block* v. *Hirsh*, 256 U. S. 135, 137, in upholding emergency rent laws, Mr. Justice Holmes, speaking for the Supreme Court of the United States, emphasized the temporary character of such laws and said (p. 157):

> "The regulation is put and justified as a temporary measure. * * * A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."

To avoid the effect of the foregoing cases, it is asserted that the United States Supreme Court in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 405, and in *Boston Store* v. *American Graphophone Co.*, 203 U. S. 6, 26, has impliedly recognized the validity of a statute like that here involved. This was argued in the Illinois Supreme Court, and we assume the same position is maintained here.

In fact, this Court has never given the slightest sanction to a statute like this one. What the Court did say was that resale price maintenance contracts, invalid at common law and under the anti-trust statutes, might be legalized, *as between the parties to such contracts*, by statute. The Government might remove legal obstacles to parties signing such contracts as they please.

It is a far cry from this doctrine to the statute here involved, which provides that a man is bound by a contract which he never made and never had the option of reject-

ing; and that he is obliged, regardless of his consent, to sell his own goods at a price fixed by someone else.

In *Adams* v. *Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917F; 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, the Court said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about with proper regulations. But this is not enough to justify destruction of every right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business which does not offer peculiar opportunity for reprehensible practices; and as to every one of them, no doubt, some can be found, quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Query: If buyers' prices may not be fixed by statute, how can sellers' prices be fixed?

In 3 Williston on Contracts, page 2907, Sec. 1649, Limitations on resale prices, the author says:

> "* * * the United States Supreme Court has in a series of decisions held such an attempt to maintain a resale price invalid at common law, and when affecting interstate commerce, in violation of the Sherman Act, whatever form the attempt takes, even though the goods affected by the attempt are manufactured by a secret process (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 L. R. A. 376, 55 L. Ed. 502) or are protected by copyright (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339) or patent laws (*Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490) of the United States.
>
> "The argument has been made that since the law protects patents, copyrights, and secret processes, con-

tracts controlling the resale price of articles thus protected should not be obnoxious to the law.

"But it has been well said in answer to their argument. It is the policy of the law to reward individual thought and research by protecting the enjoyment of their fruits. Thus the author (*Palmer* v. *DeWitt*, 47 N. Y. 532) the news gatherer, (*Dodge* v. *Const. Info. Co.*, 183 Mass. 62, 66, N. E. 204) and the owner of an unpatented invention (*Tabor* v. *Hoffman*, 118 N. Y. 30, 23 N. E. 12) are protected against the piratical use of their peculiar property. A similar protection is extended to the chemist who has discovered a secret formula. (*Harrison* v. *Glucose Sugar, etc. Co.*, 116 Fed. 304.)

"But it does not follow that because a secret process or formula will be protected against betrayal by those to whom it has been communicated in confidence under a contract for a restricted use, that a system of contracts for the control of all sales and subsales of the article when produced will be outside of the sales in restraint of trade, simply because it is the product of such secret formula."

The doctrine of the United States Supreme Court as regards Resale Price Maintenance is warranted.

In *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373 (1911) this Court held that resale price maintenance contracts are invalid at common law and where they affect interstate commerce are in violation of the Sherman Anti-Trust Act.

This is true even though the goods are manufactured by a secret process, or are protected by patent or copyright laws of the United States.

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339 (1908).

Bauer v. *O'Donnell*, 229 U. S. 1 (1913).

The basis of this Court's decision is:

1. Such contracts effect a restraint on alienation.
2. Such contracts tend toward monopoly.

3. Such contracts involve an unreasonable restraint of trade, both at common law and under the Sherman Anti-Trust Act of 1893.

This Court in holding resale price maintenance contracts to be in restraint of trade and invalid, has been chiefly concerned with the injury to the public—that arising from lack of competition itself or from unfair competition.

A system of resale price maintenance involves a restraint of trade, because, by such a system, the manufacturer restricts the sale of his articles to only those dealers who agree to resell at the standard prices he puts upon the articles. Then dealers who contract to maintain the resale prices are absolutely bound to sell at the prices set by the manufacturer, or else be involved in a breach of their agreement with him.

Such restraints are unreasonable because of the adverse effect on the public. The interest of the manufacturer in resale price maintenance should not be protected so fully that it will deprive the public of free competition, so as to injure it beyond the benefit it will bring the manufacturer.

The public is interested in low prices, quality goods, and efficient dealer service. Under a system of free competition, the public obtains low prices, good quality goods, and efficient service chiefly through dealer or retailer competition. Certain retailers, by reason of efficient management, are enabled to sell a good standard quality of goods at low prices, making a profit by reason of large distribution. They get the greater share of the patronage of the consuming public. Close observance to their customers' ever changing desires maintains their supremacy. They are the dependable barometer of the public wants and demands. The public is prejudiced by any system which should injuriously affect the efficient dealer or benefit the inefficient or high cost dealer. Any system which handicaps the efficient

dealer is not a fair system of competition. The efficient dealer is most successful under a fair system of competition.

Resale price maintenance handicaps the efficient dealer, and favors the high cost dealer. It is unfair competition. It deprives the efficient dealer of his most effective means of competition—low prices. The manufacturers, desiring large distribution, under the resale price system will fix a system of prices under which most dealers can make a profit. Naturally such prices would be above those of the efficient dealer, and tend towards those of the high cost dealer. The public is deprived of the benefit of competition among dealers and is compelled to pay prices based on an allowance of profit to high cost dealers.

The findings of the Federal Trade Commission against the Cudahy Packing Co., for maintaining resale prices on Old Dutch Cleanser, showed an allowance on the resale price so that in a majority of cases, from ten to thirteen per cent gross profit was made by dealers; a gross profit which the commission found was ample to support even the highest cost dealers handling Old Dutch Cleanser. (19 Col. L. Rev. 265.)

Under a resale price maintenance system, since the price set will be one which will tend to give a profit to the high cost dealer, and further, since price competition will be lessened, the public will pay higher prices for goods than under a system of free competition.

The rule against restraints on alienation makes void every provision or contract restrainng the alienation voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels, real or personal, whether legal or equitable. The policy underlying the rule is that all property be freely transferable and marketable. Under the system of resale price maintenance the manufacturer

demands that the dealer shall not resell, shall not again transfer the article, unless he resells at the price set by the manufacturer.

A resale price maintenance system tends toward monopoly; the dealers tend to become the agents of the manufacturer. Newcomers cannot enter the field, since the retailers are lined up with the established manufacturers by contract.

The chief argument to sustain the validity of resale price contracts is that such a system is necessary to protect the good will and public favor which the manufacturer builds up by advertising and long established sound course of dealing, from predatory price cutting. Predatory price cutting is described generally, as the advertising and selling of identical goods at less than the fixed price, or at even less than cost, for the purpose of inducing the purchaser of identified goods to buy unidentified goods at a large profit to the seller.

Hence predatory price cutting entails some further action on the part of the dealers than the bare cutting of the prices on the goods themselves. Price cutting is practiced throughout the country by the most reputable merchants and requires no justification as a commercial practice, or as a means of competition.

The Illinois Fair Trade Act recognizes legality of price cutting in unidentified goods, and by its Anti-Trust Act encourages it.

If the goods of the manufacturer are a credit to the manufacturer the manufacturer should not fear price cutting, since it tends to bring about a larger distribution of his product. If they are not a credit to the manufacturer, he deserves not only to be injured, but to fail. It has been said that an article of merchandise, without a trade-mark,

is like a mule, without pride of ancestry or hope of posterity.

The only injury the manufacturer could seek to prevent by a resale price system then, is the type of a fake bargain sale where prices of standard identified goods are cut for the purpose of attracting customers to purchase other goods, on which prices are not cut, and on which a profit is expected to be made. This injury is too slight to justify resale price maintenance as a preventative. It is found to be only spasmodic since it is not profitable to the ordinary dealer, in comparison with the risk he runs of losing the right to deal with the goods of manufacturers of standard goods; and, in comparison with his risk of injury to his subsequent sales of standard articles, which, naturally, if of good quality, tend to form the greater share of his ordinary business.

To sum up:

Resale price maintenance is in restraint of trade, and unreasonably so because: (a) it throttles the efficient dealer in competition, by depriving him of his most effective means of competition, and handcuffing the efficient dealer, gives rise to unfair competition; (b) it injures the public as consumers similarly to the way it injures the efficient dealers. It deprives the public of low price competition and of the most certain barometer of public wants; (c) it makes it practically impossible for dealers to convert their goods into ready cash in case of financial embarrassment.

Such contracts are in restraint of alienation because they allow the manufacturer to curtail the subsequent commerce of his articles, after he has sold the goods to the dealers; a sale which passes title absolutely to the dealer.

The interest of the manufacturer against predatory price cutting is not of strong enough importance or weight to

warrant holding the contracts to be reasonable, since predatory price cutting is bound to be only spasmodic, and is subject to legitimate *checks* of the manufacturer and of the law where it involves fake bargain sales.

As Chief Justice Hughes says in the Dr. Miles case, 220 U. S. 373:

> "The manufacturer having sold his product at prices satisfactory to himself, the public is entitled to whatever advantage may be derived from the competition in the subsequent traffic."

We repeat, therefore, that the legislature has exceeded its constitutional power in enacting a statute which regulates the selling price of ordinary commodities and is applicable to all businesses.

IV.

Legislation identical with Section 2 of the Fair Trade Act has been held invalid by the court of last resort in New York and held valid by the court of last resort in California by a divided court, two judges filing dissenting opinions.

The freedom of contract of those not desiring to enter into re-sale price agreements is impaired by Section 2, of the "Fair Trade Act." It restricts the right to sell a product which he owns at the price he desires.

In *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409, the New York Court of Appeals held the New York Fair Trade Act, substantially in all respects the same as ours, unconstitutional.

The case related to the sale of books by Macy & Co. below prices stipulated in contracts between Doubleday, Doran & Co. and its vendee, and to which contracts Macy

& Co. were strangers. The complaint was dismissed in the lower court and on appeal the ruling was affirmed.

The Court in holding this section of the act unconstitutional and void, said:

> "That the states cannot fix the selling price of any and all commodities has been settled." (*Williams Co.* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson & Bro.* v. *Banton*, 273 U. S. 522; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490.)
>
> Books, at least these books, are not 'affected with public interest' any more than theatre tickets; no emergency has yet arisen in literary publications, and the business is not such as comes within the classes which must submit to rate fixing.
>
> Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers.
>
> Under the Nebbia case, for instance (291 U. S. 502), no one would doubt now that New York State would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in 262 N. Y. 259.
>
> But to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation.
>
> What the legislature cannot do directly it cannot do indirectly, nor does it cease to be a price fixed by the legislature because that body has clothed the publisher with the power or authority to establish it.
>
> For a publisher to agree with its subsidiary or agent to the price of a book which shall thereafter bind all other parties who purchase like books from the publisher is in reality a method whereby the legislature

> fixed the price; it is a species of delegated authority. The plaintiff * * *, the publisher, was not obliged to sell Macy & Co.; it could do so or not as it pleased, and it could refuse to sell because Macy was cutting the price. (*U. S.* v. *Colgate & Co.*, 250 U. S. 300.) * * *"

In the other, the Supreme Court of California divided four to two in favor of the validity of the similar statute of that state. The Illinois Supreme Court in the instant case adopted and followed the majority opinion in *Max Factor & Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177 (1936), the California case, and not the two dissenting opinions filed by the minority which chose to follow the New York decision in *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272; 199 N. E. 409 (1936).

The basis of the Illinois and California decisions is that the "Fair Trade Act" has a reasonable relation to a proper legislative purpose and is neither arbitrary or discriminatory.

The New York Court of Appeals in *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 bases its decision, as does the dissent in *Max Factor Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177, on the fact that production and sale of trade marked articles was not "a business affected with a public interest," which is a prerequisite to price fixing legislation.

The prime cleavage in the reasoning between the opposing views of the New York Court and the California dissent and the majority opinion in California and the Illinois decision relates to the constitutionality of price fixing legislation and its distinct history.

This Court first developed the doctrine that there was a separate category of business "affected with a public interest" in which prices might be regulated in *Munn* v. *Illi-*

nois, 94 U. S. 113. This Court there said that the owner, by devoting his business to the public use, in effect granted the public an interest in that use and subjected himself to public regulation. The finding of a public interest was a prerequisite before prices could be regulated by statute. This test was followed for fifty years without question.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court held that a business was not affected with a public interest merely because it was large, or because the public might have some feeling of concern in respect of its maintenance.

In *Tyson* v. *Banton*, 273 U. S. 418 (1927), this Court held the sale of theatre tickets was not affected with a public interest and statutory price regulations thereof was invalid. In the dissent by Mr. Justice Stone and the late Mr. Justice Holmes, the phrase "affected with a public interest" is for the first time declared vague and unsuitable as a test.

In *Ribnick* v. *McBride*, 277 U. S. 350 (1928), this Court by a six to three majority continued to use the old test, the dissent stating there was no controlling difference between reasonable price regulation and other forms of regulation curtailing liberty.

In 1929, *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court followed the same test, the late Mr. Justice Holmes dissenting without opinion.

In 1934, by a five to four majority in *Nebbia* v. *New York*, 291 U. S. 502, this Court flatly denied the existence of separate business categories. The Court applied the same test as used in other fields relating to due process in the protection of one's personal liberty. The Court applied the test that the regulation must not be unreasonable, arbitrary or capricious and that the means must have a substantial

relation to the object sought to be attained. Mr. Justice Roberts, stated, however, that:

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

The New York Court, which decided the Nebbia case, 291 U. S. 502, before its appeal to this Court, distinguished that case from *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, in holding the New York Fair Trade Act unconstitutional, stating the Nebbia case, 291 U. S. 502, could be distinguished on the facts. It followed the old test of *Williams* v. *Standard Oil Co.*, 278 U. S. 235, and the Tyson case (273 U. S. 418).

In California, the majority, and in Illinois the Courts accepted the language of the Nebbia case (291 U. S. 502).

The production and sale of trade-marked articles as a class is not *per se* a business "affected with a public interest" as required under the rule, if it still is the rule.

The California majority and Illinois Courts attempted to escape the problem by asserting that the main purpose of the Statute was to protect the good will of the producer, the contracts of the retailers and the welfare of the public; that its purpose was not to fix prices and therefore the statute was outside the price fixing field. (Wilson J., 363 Ill. 559, at 568.) This Court is not bound by characterizations of the subject matter of a statute by the State Supreme Court so far as they bear on its constitutional effect.

This argument is similar to the dissent of Mr. Justice Stone in *Tyson* v. *Banton*, 273 U. S. 418, where it is said that the price of the tickets was not being regulated, but rather the amount of profit the ticket "scalper" should be allowed to make.

The fact remains, in each case however, that a person is prevented from selling what he owns for such price at which he wishes to sell. This is the fundamental liberty which the cases of this Court were so careful to protect.

Under this rule the act is unconstitutional.

A. The Fair Trade Act of Illinois is also unconstitutional because:

(1) Discriminatory.

The manufacturer is not required to sell at the contract price even to the same class of wholesale or retail customer; he may be selling at cost and at the same time be suing, for damages or an injunction, a retailer who sells at less than contract price.

(2) Indefinite.

Where several contracts of varying retail prices exist there is no determination as to which one is the controlling price.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

Connelly v. *General Construction Co.*, 269 U. S. 385, 390.

Cline v. *Frink Dairy Co.*, 274 U. S. 445, 453.

(3) The price fixed is left to the uncontrolled dictates of the producer.

Mr. Justice Thompson dissenting in *Max Factor & Co.* v. *Kunsman*, 91 Cal. Dec. 345, 55 Pac. (2d) 177 (1936), said:

> "A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any responsibility," citing *Washington* v. *Roberge*, 278 U. S. 116 and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

(4) The act covers too much territory.

As was said in *Tyson* v. *Banton*, 263 U. S. 418, it is not permissible to spread an all-inclusive net sure to entangle the innocent on the chance that some guilty party may be caught. The Illinois Fair Trade Act enmeshes honest merchants, who may be content with smaller profits and who, by reason of greater efficiency are able to sell at lower prices and still make profit. The act is not limited to the unscrupulous price cutter out to destroy his competitors.

The Illinois Court in its decision, 363 Ill. 559, relies upon two decisions by Vice-Chancellor Lane in *Ingersoll* v. *Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030, and 89 N. J. Eq. 322, 108 Atl. 128. The Ingersoll case was decided under a statute quite different from the statute here involved and upon facts very different from those shown in the present record. In the Ingersoll case, actual fraud on the part of the defendant was both averred and proved. Here, it is not alleged that the defendant is doing anything other than honestly selling its own property at a price less than that fixed by the plaintiff and strangers in the contract wholly between themselves.

The decisions in the Ingersoll case are by a single judge in a court of first instance. As authority the Ingersoll case, to put the matter conservatively, does not outrank the decision of the New York Court of Appeals. The Ingersoll case was never appealed, and the New Jersey Appellate courts have never passed upon the constitutionality of the statute here involved. In seventeen years the case has never been approved or cited by any New Jersey decision in so far as we have been able to discover.

Apparently neither the New Jersey legislature nor the sponsors of price-fixing legislation have heretofore thought that the statute upon which the Vice-Chancellor passed in the Ingersoll case permitted a manufacturer to dictate

resale prices, for by Chapter 58 of the Laws of 1935, the New Jersey legislature adopted a bill identical with the Illinois Fair Trade Act here challenged. Such a statute, of course, would have been unnecessary had the price-fixers been willing to rely upon the Ingersoll case or the statute considered in that case.

The cases of *Nebbia* v. *New York,* 291 U. S. 502, and *Munn* v. *Illinois,* 94 U. S. 113, also relied upon by the Illinois court in its decision, are not applicable because the statute does not vest price control in the hands of governmental agencies, nor is it concerned with emergency goods.

Note the Wisconsin Fair Trade Act (Sec. 133.25, as added by Chap. 52, Laws of 1935, effective May 2, 1935) similar in all provisions to the Illinois Fair Trade Act, but containing an additional section as follows:

> "7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the department of agriculture and markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract shall not be set aside. If upon such hearing the department of agriculture and markets shall find that such contract is unfair and unreasonable as to its minimum resale provisions, said department may by special order declare such contract to be in restraint of trade. * * *
>
> (c) Decisions in such cases shall be subject to judicial review as provided in Section 99.27."

Here at least is a semblance of an attempt to prevent the arbitrary dictates of the price fixer from determining what the public shall pay for the trade-marked or branded articles of merchandise, and a recognition of the unreasonable and discriminatory character of the act, in the absence of

any safeguard by way of governmental supervision over prices.

It is one thing for the law to allow a man voluntarily to fix the selling price of his own property. It is quite another for the law to compel a man to sell his property at a price fixed by somebody else. The Constitution may permit a man to fix the selling price of his own property. It does not compel a man to sell his own property at a price fixed by another.

V.

The statute is an unconstitutional delegation of legislative power to individuals, therefore denying to retailers the equal protection of the laws as well as due process of law.

That the legislature power may not be delegated, is a proposition so elemental, as to scarcely require the citation of authority for its support.

The suspension of a statute, *i. e.*, the state anti-trust laws, as to price maintenance contracts on trade-marked or branded goods, delegates the legislative powers to the individuals entering into such contracts. It is said by Cooley-Constitutional Limitations, 8th Ed., Vol. 1, pages 232-235, where abun ınt authority is cited:

> "The suspension of a statute is a legislative Act, unless based upon some contingency, condition, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body, whose duty, it is to execute or administer the law suspended."

Here individuals suspend the anti-trust act of the state by entry into the price fixing contracts. Two or more retailers can not combine and fix a price on a commodity

but the producer through a contract with one or both can fix the price with impunity from the Anti-Trust Act of Illinois.

The individuals may elect to proceed under the "Fair Trade Act" and enter into contracts with impunity of enforcement of the anti-trust laws against them or not, as they may choose.

Under the Fair Trade Act, no official body is set up to fix prices. It is left to private individuals, producers, to determine, firstly, whether prices should be fixed and, secondly, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard on either question.

The retailer who is going to be restricted in the conduct of his own business by the conclusions reached, is not allowed to present his views as to the reasonableness of the price or indeed as to the necessity for fixing any price. The consumer who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed. No machinery is provided for judicial or administrative review of any of the acts of producers or retailers before fixing prices.

This is the same type of unconstitutional delegation of legislative power as brought about the setting aside of the National Industrial Recovery Act, and with it the Illinois State N. R. A. *Schechter Poultry Corp'n* v. *U. S.*, 295 U. S. 495.

In this case the Supreme Court held section three of the National Recovery Act to be an unconstitutional delegation of legislative power to the President in that it does not supply standards or prescribe rules of conduct

to be applied to particular states of fact determined by appropriate administrative procedure. The Court states:

> "Instead of prescribing rules of conduct, it (Section 3 of the Act) authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes and thus enacting laws for the government of trade and industry, throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power."

It will be remembered that these codes prescribed prices at which commodities were required to be sold, the same as the contracts provided for by the Fair Trade Act. The Wisconsin "Fair Trade Act" which is in large part similar to the Illinois Act, attempts to meet these objections (Section 133.185, 133.25 to 133.27 Wis. Stats. 1935) by providing for complaints by consumers as to unfair and unreasonable prices to the Department of Agriculture and Markets, which body conducts hearings, upon notice, to determine the fairness and reasonableness of the price resale maintenance contracts, subject to judicial review of its findings declaring any of such contracts illegal or valid. Here is recognition of the fatal defects in the type of Fair Trade Act enacted in Illinois.

All the powers granted to the President in code making under the National Recovery Act, all the powers granted to the Department of Agriculture and Markets under the Wisconsin Law, under the provisions of the Illinois Act, are within the hands of the individual retailers, or producers to exercise at their whim and fancy.

No clearer exercise of the legislative powers by individuals can be well imagined.

The Fair Trade Act, even though it were enacted for a valid and constitutional purpose, as applied to this defendant, cannot be upheld because, in its operation, it is arbitrary, discriminatory, and the means adopted to accomplish the legislative purpose are not appropriate to that end. This principle was recognized in *Nebbia* v. *N. Y.*, 291 U. S. 502. "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied. * * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. * * *" Further statement of this same principle may be found in numerous other cases in the United States Supreme Court. (*Nectow* v. *Cambridge*, 277 U. S. 72; *Adams* v. *Tanner*, 244 U. S. 590; *Burns Baking Co.* v. *Bryan*, 264 U. S. 594; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402.)

This defect in the Illinois "Fair Trade Act" is the attempt to give to private persons unlimited power over the property of others Unless the courts are prepared to hold that by placing his brand upon a commodity, the producer retains a property right in that commodity until it reaches the hands of the consumer, so that he may fix its price at every stage of distribution, this statute must fall. That it is unconstitutional to place such power in the hands of private individuals seems to be plainly indicated by the authorities.

Thus in the case of *Baltimore* v. *Radecke & Co.*, 49 Md. 217 (Court of Appeals), an injunction was granted to

restrain the prosecution of an action to collect a penalty for each day's failure to remove a steam engine as a claimed nuisance. The plaintiff secured a permit to install the engine on his premises, under and pursuant to an Ordinance, which contained a clause that the engine was "to be removed after six months' notice to that effect from the Mayor. In affirming the decree granting the injunction the court said:

> "But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void."

In *Yick Wo* v. *Hopkins,* 118 U. S. 356, in an opinion in connection with a decision reversing the Supreme Court of California, the Supreme Court of the United States said, in reference to an ordinance requiring a permit from the board of supervisors of San Francisco before operating a laundry in a building of other than brick or stone construction, and where the applicant had been operating his laundry for some twenty-two years, was refused a permit, and fined for violation of the ordinance:

> "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This question was the occasion of recent decisions in *Darweger* v. *Staats,* (267 N. Y. 290). There the legislature passed what was known as the State National Recovery Act. The statute, enacted as an emergency measure, provided that upon the filing in the office of the Secretary of State of New York a copy of any code approved by the President, such code should become effective for intrastate transactions in New York. As a result of the statute, a code authority within New York attempted to fix prices of coal in accordance with authority given in the code filed in Washington.

The court concluded that by this statute "the legislature of the State of New York has turned over to the National Administrator the question of determining whether there shall be price fixing in New York State of coal and what it shall be." The court on this ground declared the statute unconstitutional, that the legislature cannot leave to a National Administrator the declaration of the necessity for fixing prices in the state. Like views as to the unconstitutional delegation of legislative power under provisions of the federal constitution, similar to the provision of our state constitution, may be found in *Panama Refining Co.* v. *Ryan,* (293 U. S. 388) and *Schechter* v. *United States,* (295 U. S. 495, 79 Lawyers Ed. 888).

The Fair Trade Act is a broader delegation of power than was declared unconstitutional in *Darweger* v. *Staats,* (267 N. Y. 290). The delegation here is to private individuals, indeed, rather than to governmental authorities. The delegation has been without any standards or restrictions. As was stated by the court, "The legislature has left too many things to be determined by other bodies to make this law constitutional."

The plaintiff relies chiefly upon the Nebbia case (262 N. Y. 259; 291 U. S. 502). It is true that there is language in the Nebbia case which, ripped from the context of the opinion and divorced from the facts involved, might give some substance to the plaintiff's contention. The facts in that case, however, bear no resemblance to the present one.

In that case:

1. There were legislative findings of fact based upon a complete and thorough legislative investigation.

2. The enactment was effective only during the pre-

scribed period of a short emergency, which was declared by the legislature to exist.

3. The fixing of prices was related to one commodity only—milk.

4. The price of milk was to be fixed by a governmental agency after hearings, and was to be subject to judicial review by certiorari.

5. The legislative findings of fact upon which the statute was based were as follows: (a) that milk was an essential item of diet of all of the people of the state; (b) that the absence of proper safeguards of such product would lead to the spread of disease; (c) that proper and adequate safeguards were being threatened in the State of New York because of existing insufficient return of milk producers; (d) that the milk industry was a paramount industry of the state and that the maintenance of it was vital to the credit and economic structure of the state; (e) that the financial structure of the industry was in danger because of certain conditions and various enumerated factors of instability peculiar to the industry itself.

6. The statute was admittedly passed as a health measure under the recognized limitations of the police power.

7. Prosecution and enforcement were lodged with the state authorities.

Each of the above itemized facts present in the Nebbia case indicates a radical difference from the case at bar. A mere statement of the differences should suffice to indicate that the holding of the court in the one is in no way controlling upon the legal conclusions in the other.

It is true that in the Nebbia case this Court did not

require in terms that the commodity be "affected with a public interest." That ancient expression was defined anew in the opinion of the court (page 536) as a phrase which "can in the nature of things, mean no more than that in industry, for adequate reason, is subject to control for the public good." There is implicit in any definition of the phrase, however, the requirement that there be such relationship between the business and the public welfare, that governmental interference with the private property and rights involved will be justified in spite of the due process clauses.

It cannot be contended that the Nebbia case is authority for the proposition that the prices of ordinary commodities may, without more ado, be fixed by the legislature, much less by private individuals. The New York Court of Appeals pointed out in *Darweger* v. *Staats,* (267 N. Y. 290) that the Nebbia case was not such authority, even if an emergency were declared to exist, and even if the price-fixing power were limited to the period of the emergency. The court stated:

> "The briefs place much emphasis upon *Nebbia* v. *New York,* (291 U. S. 502), *People* v. *Nebbia,* (262 N. Y. 259), and claim that this is an authority to sustain legislation fixing the price of any commodity—shoes, clothes, coal, hardware or anything else that may strike the Legislature's fancy, provided an emergency may be declared. The fixing of the price of milk in the Nebbia case was a mere incident to other regulations which tried to meet an abuse growing up to the detriment of the farmer and his stock. This control of the output protected the very vitals of the industry, and it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like. To say that the Nebbia case is an authority for the Legislature to fix the prices of all commodi-

ties is not justified by the decision. What the legislative power may be in a given case regarding any industry we do not undertake to say. Sufficient unto the day is the power thereof."

Although somewhat different phraseology was used by the courts sustaining legislation fixing the price of milk, still "it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain, and the like." *Darweger* v. *Staats,* (267 N. Y. 290).

Price fixing agreements in Illinois are against public policy, and the Supreme Court has stated that it believes the legislature meant to prohibit them, when it enacted the state anti-trust and anti-price fixing act. The "Fair Trade Act" gives an unjust privilege to the great manufacturers to obtain more profits. There is no distinction in the anti-trust act between price fixing agreements covering branded merchandise as opposed to bulk or unbranded merchandise. The Fair Trade Act providing for such distinction is sought to be justified by the Illinois Supreme Court on the ground that it provides for "vertical" rather than "horizontal" price fixing. The latter type of price fixing is admittedly invalid under our anti-trust act, *i. e.,* agreements by groups and producers, wholesalers or retailers to fix the sale or resale price of their collective products or commodities.

"Vertical price fixing," meaning thereby the efforts of a single producer to fix and maintain the prices of his products by those who sell the ultimate consumer, it is claimed is not. The appellant asserts that the contracts of the plaintiff, with its distributors, with the producers, Jos. Seagram & Son, Inc., and Joseph Seagram & Son,

Ltd., together with the contracts with the retailers, is a combination, agreement, etc., condemned by the Sherman Anti-trust Act.

While a law might be devised to favor "vertical price fixing," surely the Fair Trade Act does not legalize it. The defects in the act are so seemingly patent as to make it imperative that it be declared invalid. The act does not even provide that the producer shall enter into similar agreements with each retailer. One might be favored over another and seemingly the less favored one would have a cause of action against the more favored retailer though the latter would be living up to the letter of his contract with the producer. The Fair Trade Act commits legislative sabotage on the delicate mechanism of production that has already suffered too much from political experimentation.

It is class legislation and foreign to our constitutional policy, and against the tradition of our democratic institutions for the government of Illinois to be placed in the position of extending economic protection to any particular business group, whether manufacturers or distributors.

It is the most objectionable sort of class legislation. It is in the interest of the producer. It is no substantial benefit to the retailer. It lays a tremendous burden on the consumer. The law gives to the manufacturers of the country the privileges which the legislature refuses to its farmers—that of fixing the selling price of their products.

Under this Act, a manufacturer can affix a trade name to practically any article—to any object of commerce—to the necessities of life, to flour, medicines, meats, canned goods, cereals, crackers, to clothing of all sorts, to plumb-

ing and heating apparatus, to cement, gasoline and building materials—and may then declare the uniform price at which the article may be sold throughout the state. This it may do with no governmental or other agency to determine whether the article is of standard or inferior quality, whether it possesses merit or lacks merit, whether it is in open competition or controlled by a monopoly, whether the price is fair or exorbitant. The manufacturers may sell the goods, receive full pay for them, and yet retain full control over their disposition and selling price.

The due process clause is all embracing enough to prohibit such legislation. (*United States* v. *Yount*, 267 Fed. 861, 863):

> "It seems reasonably clear that the 'due process of law' of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws,' which no state may deny to any person under the provisions of the Fourteenth Amendment. *Leeper* v. *Texas*, 139 U. S. 462, * * *; *Giozza* v. *Tierman*, 148 U. S. 657."
>
> "* * * the equal protection guaranteed by the Constitution forbids the legislature to select a person natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

The "Fair Trade Act" establishes arbitrary, discriminatory, unreasonable, and unjust classifications inhibited by the Constitution.

Chapter 38, Sec. 598, *et seq.*, Ill. Rev. Stats. 1935, is the state anti-trust act containing practically a re-enactment of the similar provisions of the Sherman Anti-trust Act. It provides for punishments for price fixing on any article of merchandise or commodity, and declares contracts relating thereto void, and relieving purchasers thereunder from paying therefor. Now under the "Fair Trade Act" a limited form of price fixing is permissible, and the anti-trust act is amended by implication.

Vendors and vendees of trade-marked or branded merchandise, as opposed to retailers of unbranded or non-trade-marked goods may fix the resale prices of their merchandise, free from the pains and penalties of the anti-trust act, whereas the latter, if they attempt to do so, subject themselves to the full penalty of the law. Non-assenting owners of trade-marked merchandise are compelled to abide by the prices fixed by third persons in contracts to which they are strangers, whereas retailers in unmarked merchandise are not so affected. Is there a reasonable basis for this classification?

The Illinois Supreme Court in its decision, 363 Ill. 559, 577, says the Fair Trade Act does not change the legislative attitude toward trusts. The act itself provides that the commodities permissible of price fixing, must be in "fair and open competition" with those of the general class.

The invalidity of a statute obnoxious to the fourteenth amendment is well illustrated by the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The Illinois Trust Act of June 20, 1893, prohibited trusts or combinations

in restraint of trade or competition. By section 9 the provisions of the act were made inapplicable "to agricultural products or livestock while in the hands of the producer or raiser;" and section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any suit therefor. Suit was instituted for sewer pipe sold and delivered and the act was interposed as a defense. The Supreme Court of the United States held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The court said that under the "statute all except producers of agricultural commodities and raisers of livestock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and livestock raisers, in respect of their products or livestock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities within the limits of a State, and agriculturists and raisers of livestock, are all in the same general class, that is, they are all alike engaged in domestic trade which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions as the State may legally prescribe."

This Court was unable to discover a reasonable basis for the legislative classification invoked to sustain the statute involved in *Connolly* v. *Union Sewer Pipe Co., supra.* The court said: "The difficulty is not met by saying that, generally speaking, the State when enacting

laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'" The court declared that a statute such as the one under review was not a legitimate exercise of the power of classification; that it plainly denied the equal protection of the laws of those against whom it discriminated.

The Illinois Supreme Court, in its opinion, 363 Ill. 559, 580, seeks to distinguish this case in its applicability to the "Fair Trade Act" by indicating that the latter statute is designed to protect the goodwill established around a trade mark, brand or name. The retailer, however, in selling below the fixed price of the owner of the trademark, brand or name does not infringe upon the trademark, brand or name. The latter are adequately protected by the trade-mark statutes of Illinois, *i. e.*, Chapter

140, Sec. 7, Ill. Rev. Stats. 1935. This is the same argument employed by the Illinois and California majority in attempting to escape the rule that the business must be one "affected with a public interest" before prices therein may be regulated by statute. The fact remains that it is the price fixed by the owner of the mark or brand which is protected by the act, and not his good will. This court did not hesitate to say in *Tyson* v. *Banton*, 273 U. S. 418, that the price of the theater ticket was attempted to be regulated by the statute, and the dissent took the view that it was the profit of the "scalper" that was attempted to be regulated.

Here it is the price of the commodity and not the good will surrounding the same that is regulated by the statute. The Illinois Court used the same argument to distinguish, and for refusing to follow *Horwich* v. *Walker-Gordon Laboratory Company*, 205 Ill. 497, and a similar case of *Lippman* v. *People*, 175 Ill. 101, which is adequately discussed in its opinion, 363 Ill. 559, 578-579, and the answer to which is hereinabove contained.

The "Fair Trade Act" confers a special right and immunity upon owners of trade-marks, names or brands. Chief Justice Hughes, speaking for the court in *Dr. Miles Co.* v. *Park*, 220 U. S. 373, said that the claimed right to make resale price agreements was a claim of a special immunity or privilege.

The statute regulates and protects resale prices. Protection of good will of the trade-mark is a subterfuge to conceal the former. The statute is a price fixing statute despite all attempts to describe or defend it as the contrary. The legislative classification here attempted is not based upon any reasonable difference in situation. The power of the legislature to make a classification has been

here arbitrarily exercised. There is no reasonable, substantial difference in kind, situation or circumstance bearing a proper relation to the purpose of the law existing at the time of its enactment.

In *Adkins* v. *Children's Hospital* (1923), 261 U. S. 525, 67 L. Ed. 785, a board of three was given the power to fix the wages of women and children. The Court held the statute violative of the due process clause of the Fifth Amendment. The prevailing opinion says (p. 797):

> "In principle there can be no difference between the case *of selling labor and selling goods.* * * * Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shop keeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed." (Italics ours.) Followed in *Morehead* v. *People ex rel. Tipaldo* (1936), Vol. 80, No. 16, U. S. Sup. Court (Law. Ed.) Adv. Op., p. 921.

In construing a statute, it is a well settled rule that the purpose and object of the law, the evil to be remedied and the wrong to be righted by the passage of the law should be considered and the meaning of words enlarged or restricted according to the true intent.

The Fourteenth Amendment to the Constitution of the United States provides among other things that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. It seems obvious that such arbitrary selections for legislative favor, as are contained in the Fair Trade Act, were precisely what the constitutional provisions were designed to prevent. Classifications for legislative

purposes are properly determined on existing factual distinctions and legislation made applicable to a nominal class, to the exclusion of many actual members of such class is special legislation, and a denial of the equal protection of the laws.

The whole theory of representative government is opposed to special privileges. Cooley's Constitutional Limitations, (8th Ed., p. 816). Such privileges are always obnoxious, and discriminations against persons and classes still more so.

VI.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly irrelevant to any legislative purpose.

Assuming, but not conceding, that the statute is enacted for a purpose within the constitutional powers of the legislature, nevertheless it provides means of accomplishment so irrelevant to any proper legislative purpose and permits of such an unreasonable, arbitrary and discriminatory use of power over the liberty and property of citizens that it is for these reasons alone unconstitutional.

Even a statute enacted for a valid purpose is unconstitutional if in its operation it is arbitrary or discriminatory, or if the means adopted to accomplish the purpose are not appropriate to that end.

This principle was recognized in *Nebbia* v. *New York*, 291 U. S. 502, 537, 539, where it was said by Mr. Justice Roberts:

> "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, * * *

"* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. * * *"

Further recognition of this same principle is found in *Nectow* v. *Cambridge*, 277 U. S. 183; *Adams* v. *Tanner*, 244 U. S. 590; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402; *Schlessinger* v. *Wisconsin*, 270 U. S. 230; *Liggett* v. *Baldridge*, 278 U. S. 105; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Washington* v. *Roberge*, 278 U. S. 116.

These cases condemn the statute now under consideration.

A. The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.

(a) The challenged statute unconstitutionally vests in private persons arbitrary power to fix prices at which another may sell his own property.

This statute is a private price-fixing measure. The manufacturer is given unlimited and uncontrolled discretion to fix the selling price of another's property without his consent. The price fixed may be high or low, fair or unfair, reasonable or unreasonable. It may be fixed for any reason or for no reason, capriciously or arbitrarily, unwisely, erroneously or maliciously.

The price fixing power has not been given to any impartial State officer or public body. The statute provides no standard or regulation and imposes no limit upon the private price fixing power. No impartial State officer or public body even supervises the price fixed or assures its reasonableness. There is no review by any judicial or administrative body. Private individuals are left free

and unfettered in the exercise of their discretion over the price of another person's property.

Indeed, the legislature has given to private persons the unrestrained right to determine whether price fixing is necessary at all. There is no legislative finding that it is necessary. The Legislature has singled out no specific industry which, for special circumstances as found by the Legislature, requires special regulation. By this statute a private person may fix prices when and as he wills, for any reason or no reason, or he may refrain from doing so.

Not only has the Legislature given to private persons the power to determine when prices shall be fixed and how they shall be fixed, but it has likewise vested in such private persons arbitrary power to enforce the statute or not to enforce it as they, in their uncontrolled discretion, choose. Under the terms of the statute, non-observance of the fixed price is not made a crime, and no public body is authorized to compel observance of a fixed price. The only sanction provided by the statute is an action for damages or a suit for an injunction at the behest of private persons. These private persons may enforce the statute against one retailer and not against another. Their reasons for doing so may be capricious or even malicious. One retailer may have his prices fixed so that he cannot compete with numerous other retailers who may not be coerced into observance of the fixed price.

Furthermore, the statute, by empowering the manufacturer or a competing retailer to fix the prices that another retailer may charge, has enabled private persons to nullify completely the economic advantage which a retailer may enjoy because of superior efficiency, low rent, volume, buying power, cash selling, etc. The statute per-

mits private persons to confiscate without compensation that which may be the retailer's most valuable asset, to-wit: his good will resulting from his superior efficiency and his customers' approval and confidence in his method of doing business built up by many years of effort and financial outlay.

In many cases a retailer's chief appeal to his customers is a price appeal. He is able to sell for less because of efficiency, low overhead, and his refusal to provide the elaborate services which other stores provide. To compel uniform prices is to compel certain retailers to sacrifice their customers to other stores with more elaborate services and facilities. The consumer will ultimately be obliged to pay for these frills of merchandising whether he desires them or not.

(b) The cases hold that the Legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to give them. The power is too unrestrained and too susceptible of abuse.

That the Legislature cannot constitutionally delegate to private persons control over the liberty and property of other persons is further established by *Eubank* v. *Richmond,* 226 U. S. 137. There, the City of Richmond, pursuant to legislative authority, passed a zoning ordinance which required the Committee on Streets to fix a building line not less than 5 feet nor more than 30 feet from the street line as and whenever the owners of two-thirds of the property abutting on the street requested the Committee to establish such line. Pursuant to the request of the owners of two-thirds of the abutting property, the Committee ordered a property owner to remove all portions of a building under construction so

that it did not over-extend the line fixed by the abutting property owners. For violation of the ordinance the plaintiff in error was fined. Upon appeal to the Supreme Court of the United States the judgment was reversed and the ordinance was declared unconstitutional as depriving the plaintiff in error of property without due process of law. It was admitted that the zoning ordinance was a proper object of government, just as here it is admitted for purposes of argument of this point that price fixing is a proper legislative purpose. It was contended that the particular portion of the zoning ordinance which vested in private persons power over other persons' property was arbitrary and unrelated to any admittedly valid purpose. This contention was upheld. Mr. Justice McKenna, speaking for a unanimous court, said (pp. 143, 144):

> "In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? This statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment or comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them

> in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be prompted by a line which may be so variously disposed.
>
> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others; and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

Tested in the manner and by the same standards used by the Court in the Eubank case, the statute here challenged will be found subject to all and more of the infirmities which there condemned the statute.

Again in *Washington* v. *Roberge*, 278 U. S. 116, this Court condemned a zoning ordinance, admittedly enacted for a valid purpose, because the means adopted in the ordinance to achieve its purpose were arbitrary and unreasonable. The City of Seattle had passed a zoning ordinance which provided, among other things, that a philanthropic home for old people might be established in a certain neighborhood only with the written consent of

the owners of two-thirds of the property within a certain area adjacent to the proposed home. The plaintiff applied for a permit to erect such a philanthropic home without obtaining the consent of the surrounding property owners. The permit was refused and action was brought to compel its issuance. The plaintiff contended that the particular portion of the zoning ordinance relating to homes for the aged was arbitrary and unrelated to any admittedly valid general purpose. In upholding this contention, Mr. Justice Butler, speaking for the Court, said (pp. 121-122):

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 225, 226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment."

In the case at bar there is the same delegation of arbitrary power to individuals "uncontrolled by any standard or rule prescribed by legislative action." This power may be exercised by individuals arbitrarily, for selfish reasons, or for no reason at all. Here, as in *Washington* v. *Roberge*, the delegation of power so attempted is repugnant to the due process clauses of our Constitution.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court held unconstitutional an ordinance of the City of San Francisco which vested in a governmental body arbitrary power to

issue or refuse business licenses without any standard set out in the law itself. Mr. Justice Matthews, speaking for the unanimous Court, said (p. 369):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In *Yick Wo* v. *Hopkins,* the Court held unconstitutional a delegation to a governmental body of power over other people's property, there being no standard or regulation prescribed by the legislature. *A fortiori,* we submit, the delegation of price fixing power to private individuals by the statute here under consideration is unconstitutional as depriving citizens of liberty and property without due process of law.

The statute involved in the instant case gives to private persons unlimited power, not only to remove a restriction imposed by the legislature, but to impose restrictions on other people's property. The statute therefore must be condemned upon the authority of the cases above cited.

(c) The argument that competition between brands will prevent all arbitrary, unreasonable and discriminatory price fixing is without merit.

It has been asserted by proponents of this legislation that no producer will set too high a price on his product because he must meet the competition of other branded goods of the same general class.

There is doubt that there ever can really be "free and open competition" if a brand is well advertised. There is sworn evidence in a very recent decision of a Federal Court that the manufacturer can and will charge "whatever the traffic will bear." (*Bourjois, Inc.*, v. *McGowan, Collector*, 12 Fed. Supp. 787.

The Court states:

> "This litigation arises from plaintiff's attempted concealment of its selling price through the organization of sales corporations. * * * The conclusion follows that the method by which the plaintiff determined its selling price was a mere cover and a fraud upon the Government."

The finding of the Court shows how a producer, acting through a subsidiary, or a collusive retailer, under the "Fair Trade Act" could mulct the public. What protection would an independent retailer, large or small have, if required to determine quickly at his peril the resale fixed price in some contract, oral or written, against the fraudulent manipulation of prices as demonstrated in the case cited?

Moreover, although brand owners may be free to compete, there is the trade association which manages "by informal means to bring about concerted policies designed to 'stabilize' the industry." The surest means of restricting competition among manufacturers is a method whereby each manufacturer can control the dealers. If the dealers' resale price can be controlled and each manufacturer can force every dealer to maintain his fixed price by damage suits and injunction, then by "informal means" the manufacturers of a particular commodity have little difficulty in raising their prices and maintaining them for their own advantage. Given a vertical resale price combination, forced on all dealers by statute, "free and open competi-

tion'' among manufacturers in any real sense becomes a myth. Under such a system the manufacturers could destroy a retailer. Even where the law merely legalizes resale price contracts between parties thereto as in England, and does not (as this statute does) bind non-assenting parties, the result to small retail booksellers in England has been disastrous and the public has been compelled to pay exorbitant prices, according to the Encyclopedia Brittanica. (Article on ''Publishing''.)

If all retail dealers in a commodity, branded or unbranded, voluntarily combined state-wide to sell it at a fixed price, nobody would question the illegality of such a combination and the harm to the consuming public resulting from the elimination of retail competition. The effect of this statute is much worse because under it every retailer in the State can be regimented, whether he wishes to join the combination or not, at the arbitrary command of the manufacturer.

Further, this argument completely ignores the fact that there are different costs of retail distribution which are reflected in the retail price. A retailer who has an expensive location, who extends long-term credit, who has elaborate fixtures, who employs high-trained sales clerks, who exchanges goods freely, who has an elaborate delivery service, and numerous other services, must charge more than a retailer who has a low overhead, who operates a less elaborate store on a cash-and-carry system, and who does not give much service. Similarly, the efficient retailer and the retailer who does a large volume of business may be able to sell for less than a similar type of retailer who is less efficient and who does a smaller volume of business. The price which the consumer ultimately pays is higher if the particular retailer with whom he deals has a high dis-

tribution cost. The consumer pays not only for an article, but for the services and facilities that go with it.

The statute here involved puts a premium on inefficiency, and on high operating costs, and compels the consumer to pay for services which in most cases he cannot afford and therefore does not desire. The statute, moreover, deprives a retailer of what may be his most valuable asset, namely, his good will acquired over many years as the result of giving his customers the best goods possible for the least money, by reason of superior efficiency and an economical method of doing business.

This very argument now urged by the Illinois Supreme Court has been urged in support of the Stevens bill and the Capper-Kelly bill before they were defeated by Congress. The consumers recognized that, despite the argument, it is the consumer who pays the bill for price fixing. That is why 72 per cent of the consumers who answered the questionnaire of the Federal Trade Commission were opposed to legislation permitting resale price fixing. (Federal Trade Commission Report on Resale Price Maintenance, 1931, p. 157.) That is why consumers' organizations, farmers' organizations, have opposed price-fixing bills. These organizations know what price fixing does to the purchasing power of their members.

As Professor Paul H. Nystrom, of Columbia University, in a recent pamphlet entitled "Dangerous Trends Under the NRA," stated (p. 8):

> "Ultimately, however, the effect of all price fixing will be to increase the cost of goods to consumers. It is upon the consumer that the real burden of price fixing falls."

The Illinois Supreme Court's position, moreover, does not meet the possibilities of arbitrary enforcement of this statute by a producer or by a retailer against some retailer and not against others.

Furthermore, the argument assumes a divine power of foresight in the manufacturer to fix the proper retail price at which products bearing his brand will move, and which will be fair to the retailer and to the consuming public. It overlooks the fact that if the manufacturer, because of ignorance, mistake, spite or malice fixes an unfair price, it is the retailer and the consumer who must bear the injury of price maladjustment.

Moreover, the whole theory that competition among competing brands will automatically fix the proper price level for each brand is inimical to the very argument upon which the price-fixing producers rely to show the need for any price-fixing statute. On the one hand, these producers say that the public is unable to ascertain the merit of articles and, consequently, is misled and overcharged on certain goods because of price cutting on other goods. In the same breath, these same price-fixing producers say that the public will, of itself, discriminate between various brands so that if the price of one brand is raised, public patronage will switch to other brands. Such concomitant ignorance and wisdom on the part of the consumer remains one of the unexplained mysteries of the price-fixing psychology.

Finally, it is not true, as an economic fact, that competition between brands will automatically fix the price of each trade-marked, branded or named article. The success of a brand, and of the advertising campaigns which are conducted in connection with branded goods, lies in their ability to take branded articles out of competition with other articles.

While it is true that the price of a text book published by one person, may not be raised to $100 and still compete with a similar text book which is published by another and sells for $1, it is not true in the absence of price competition that the price of the first text book may not be raised, say

to $1.50 and still compete with the second text book if a sufficiently vigorous advertising campaign is undertaken.

B. The means adopted by the legislature in the challenged statute are wholly irrelevant to any constitutional legislative purpose.

At the outset, we note that more is required to sustain a legislative curtailment of liberty and property than a mere legislative finding that some evil exists and the adoption of some means of eliminating the supposed evil. Here, it may be noted there is no legislative finding stated in the statute. There was no legislative investigation. The only purpose that can be gleaned from the statute is that the object is to give manufacturers the absolute power to fix resale prices and to prevent anybody from selling for less. Despite smoke screens about selling under cost and loss leaders, we submit the real purpose is the result effectuated by the statute.

There are limits imposed by the Federal Constitution upon legislative action. The constitutional guarantees of our citizens are not to be subverted by legislative "experiments".

See:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 280.

Democracy itself, like free competition, has some evils. At times it produces demagogues, corrupt lobbies and ignorant legislators. Its enactments are sometimes adopted without due consideration or debate and, like the statute here challenged (as the records of the Assembly show), such enactments are often suddenly propelled through committee and passed in the confusing and closing hours of a legislative session without debate. Such evils, however, cannot afford a constitutional justification for legislation

abolishing democracy and substituting for it communism, fascism, monarchy, oligarchy, bureaucracy or some other form of government. Such legislation might abolish some evils of democracy, but it would also transgress the Constitution.

Even a statute for a valid constitutional purpose is unconstitutional, if the means adopted are inappropriate. The suppression of kidnapping, the promotion of child welfare and education, the encouragement of patriotism and the prevention of race conflict are all valid legislative purposes. A statute requiring all minors to be kept in a State institution under guard until majority would undoubtedly tend to prevent kidnapping. A statute requiring that all children be reared in governmental barracks and not in their parents' homes might promote patriotism. A statute requiring children to be taken from their parents and reared by official guardians might produce a better educated race and more useful citizens. A statute prohibiting sales of residential property in certain localities to negroes might prevent race conflict by keeping white people and colored people apart. Yet, we know that every one of such statutes would be unconstitutional under our system of government as depriving our citizens of liberty or property without due process of law.

See:

Meyer v. *Nebraska*, 262 U. S. 390.

Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510.

Buchanan v. *Warley*, 245 U. S. 60.

With due respect, neither gubernatorial nor presidential proclamation or opinion, nor legislative preamble, as to supposed economic conditions can deprive any citizen of his constitutional rights of liberty or property. (*Schechter* v. *United States*, 295 U. S. 495.)

In particular, the history of the statute here challenged does not lend support to its constitutionality. The Act was passed to perpetuate the waning powers of price fixing under the then dying NRA. It was sired by that unconstitutional creation. On February 20, 1935, President Roosevelt stated publicly, "Monopolies and private price fixing must not be allowed nor condoned." On May 1, 1935, the Senate Finance Committee resolved, "No price fixing shall be permitted or sanctioned under the provisions of any code." On June 14th, Congress practically wiped out what was left of the NRA by repealing power to approve any code contrary to the anti-trust laws. The death knell of code price-fixing being sounded in February, the price-fixing interests rushed to state legislatures and within the space of about three months managed to obtain legislation in eight or nine states similar to the act challenged, preserving and in some cases extending the price-fixing provisions of certain NRA codes.

The booksellers' NRA code gave the right to make all retailers sell at publishers' fixed prices. This statute is, however, even more arbitrary because the code at least provided for some sort of review by a board composed of the NRA administrator, a consumers' representative and a bookseller. It only permitted the price fixed to stand for one year after publication. This statute is without limit.

(a) If it be assumed, contrary to fact, that the prevention of the use of "loss leaders" is the purpose of the statute, the means adopted for the prevention of such practices are wholly irrelevant to that purpose.

The term "loss leader," we assume, refers to the practice of selling goods below cost merely for the purpose of attracting customers to buy other goods.

There is no charge in this case that the defendant has

ever sold any of the merchandise referred to in the complaint or any other article of merchandise as a loss leader.

On the contrary, the Court states it sold at a profit (363 Ill. 610, 612).

Much of the hue and cry about price cutting and loss leaders is merely a mask to hide the real purpose of the price-fixing interests. The so-called evils are obviously exaggerated by those who want not so much to abolish loss leaders as to fix the one and absolute price at which every retailer must sell. The Brookings Institution in its NRA survey states under the caption of "Effect of Abolishing Loss Leaders" that "thinking on the matter is muddled * * * *. The loss-leader problem is one of those far too frequently discussed with easy assumption and with a utilization of question begging words playing the role of fact and analysis."

"Price-cutting" is merely an invective phrase to describe a practice which somebody does not like. As the Federal Trade Commission stated in its Report on Retail Price Maintenance, 1931 (p. 9):

> "Meaning of 'Price-Cutting.' As is commonly used in referring to price competition among distributors, price-cutting is a term of extremely variable, often indefinite meaning, applied to any form of price competition regarded as objectionable by the user of the term * * *. The principal significance of the term, therefore, is that it indicates objection to the practice by someone."

The Federal Trade Commission, after an impartial investigation, found that the loss leader talk was much overstressed. The Commission's report states (p. 4):

> "The Commission has been at some pains to find instances of such price-cutting which were sufficiently severe to result in a permanent and material reduction of the manufacturer's volume of business, but without

discovering any instances in which it could be satisfactorily shown that decreased value was primarily due to dealer price-cutting. The reports received from dealers regarding their purchase prices and selling prices very rarely showed selling prices below the purchase prices."

And at page 162:

"No instance has yet been brought to the Commission's attention in which there was conclusive evidence that an article of real merit had been driven off the market by price-cutting alone."

If loss leaders constitute the evil plaintiffs claim they do (and for argument assuming constitutional power in the premises), the statute here under consideration goes beyond the constitutional bounds of legislative power in combatting that evil. This statute provides that no one can sell his own property below a price fixed by a manufacturer in a contract to which the owner of the property is not a party. The price fixed by the manufacturer has no relation whatever to cost. Under the statute private persons by a contract between themselves may fix the resale price of another's property at whatever level they select and may prohibit a retailer from selling even at 100 per cent profit, if they think the retailer should exact a 200 per cent profit.

Even if the prohibition of loss leaders is a valid legislative purpose, neither the Constitution of this State nor of the United States permits the adoption of the means of suppression enacted by the statute here challenged. The statute, because of its broad scope and all-inclusive character, completely restricts the liberty and property of persons whose price policy, like the defendant's, has no relation to "loss leaders."

This Court in *Tyson* v. *Banton*, 273 U. S. 418, in holding unconstitutional a State statute purporting to regulate the

resale price of an ordinary commodity (theater tickets), condemned the statute for this reason, among others, and said (pp. 442, 443):

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree, in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with—*Com.* v. *O'Brien,* 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

This Court expressed similar views in condemning legislation restrictive of lawful business in *Adams* v. *Tanner,* 244 U. S. 590, 594, 595, and in *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 9, 10.

The Court of Appeals, in *People ex rel. Moskowitz* v. *Jenkins,* 202 N. Y. 53, voiced the same opinion in holding unconstitutional an ordinance which under the guise of preventing fraud placed a prohibitive tax on itinerant vendors selling bankrupt or damaged stock. The Court, per Chief Judge Cullen, said (pp. 58-59):

> "As already conceded, the device of selling goods as bankrupt or damaged stock does excite the cupidity or economical instincts of customers and does tend to draw custom from other merchants, but a customer has the right to buy where he can buy cheap, and his means may unfortunately be so narrow that he is constrained to purchase damaged or unfashionable goods. The great department shops of New York do practically the same thing as that restrained by the statute. They advertise a reduction in prices of stock which they have been unable to freely dispose of, often to a point below cost. Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly the business. (*People ex rel. Tyroler* v. *Warden, etc.*, 157 N. Y. 116; *Wright* v. *Hart*, 182 *id.* 330.)

For the application of this identical principle to similar facts by the Supreme Court of Illinois, see *City of Carrollton* v. *Bazzette*, 159 Ill. 284, 299, 300, where a city ordinance was held unconstitutional because under the guise of regulating itinerant merchants, the real purpose was to protect the local merchant from competition.

In determining whether the means adopted by the legislature in this statute result in a deprivation of liberty or property without due process of law, the Court is always free to inquire into the real effect of the statute regardless of the purpose attributed to it, either by those seeking to uphold it or by the legislature itself. If the Court finds that the statute is without substantial relation to some evil within the power of the State to suppress, or that it unduly restricts liberty or property, it is the duty of the Court to declare the statute invalid. (See *Fairmont Creamery Co.* v. *Minnesota, supra*, at p. 11.)

Despite the cry of loss leaders, the statute here under

consideration shows on its face that it is an attempt to prevent citizens from exercising their liberty and their property rights, and to suppress free competition with respect to dealing in ordinary commodities. No matter how the statute may be described, this is its effect. Such being the case, it is as unconstitutional as was the statute held invalid in *People ex rel. Moskowitz* v. *Jenkins, supra.* There the Court perceived that a statute purporting to be enacted for the prevention of fraud was really to suppress competition with local shopkeepers. The Court said (p. 58):

> "These features of the statute plainly show its purpose, which is not to safeguard customers against fraud, but local shopkeepers from competition."

The Court also quoted with approval the following language from *People* v. *Gillson,* 109 N. Y. 389, 399:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors."

So, even if we assume that the challenged statute seeks to prevent the use of loss leaders, the legislature was without constitutional power to forbid all retail competition and to compel all retailers to sell their own property at a price fixed by another in order to achieve the legislative purpose.

(b) If it be assumed contrary to fact that the prevention of predatory price cutting (meaning thereby price cutting with deliberate intent to injure other persons) is the real object of this statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than that fixed by a manufacturer has transcended the constitutional limits of legislative power.

It is not such predatory price cutting that is condemned by this statute. Under the statute, the price fixed by private persons applies irrespective of the retailer's motive or intent in selling his own property at another price and irrespective of the effect of the retailer's prices on competitors. A retailer cannot sell below the price fixed by a manufacturer, although his sales may be at a price profitable to him or to anyone else who sells at that price. A retailer cannot capitalize on his efficiency and low overhead. He is obliged to charge his customers a higher price than he otherwise might, although they canont pay it without foregoing the gratification of other wants.

In this case in particular there is no charge of predatory price cutting against this defendant. There is no allegation that the defendant's prices are fixed with an intent to injure or destroy competitors. On the contrary, it affirmatively appears from admitted facts that the defendant is merely meeting competition, and is passing on to its customers whatever savings it can, due to its policy of cash selling, its volume and its efficiency.

Even though a statute which prohibits price cutting for the deliberate and definite purpose of injuring others might be upheld, this statute, which prohibits selling below the price arbitrarily fixed by a private person, irrespective of the retailer's motive, cannot be upheld. This is shown by a comparison of *Fairmont Creamery Co.* v. *Minnesota,* 274

U. S. 1, and *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

In the latter case, this Court upheld the constitutionality of a South Dakota statute which prohibited price discrimination "for the purpose of destroying competition of any regular, established dealer in such commodity or to prevent competition of any person who in good faith intends to become such dealer."

In the Fairmont Creamery case, this Court held invalid a Minnesota statute which prohibited price discriminations without regard to the motives behind them. This difference between the South Dakota statute in the Central Lumber case and the Minnesota statute in the Fairmont Creamery case was sufficient to invalidate the latter.

The statute here involved is not only not limited to predatory price cutting, but it is not intended to be so limited. The aim and purpose of the statute is to enable manufacturers to fix the resale prices of their products after they have parted with ownership thereof, and after the same are owned by other people and have entered into the channels of trade.

The statute is a general price-fixing statute applicable to all commodities and is not aimed at any particular price-cutting evil if, indeed, there exists such an evil. This important fact cannot be obscured by legalistic conceptions advanced in Law Review articles about "equitable servitudes;" nor irrelevant speculative analogy as to possible extension of tort, contract or trade-mark rights.

(c) The constitutionality of this statute cannot be sustained merely because it confines price fixing to goods bearing the producer's trade-mark brand or name.

(1) The sole function of a trade-mark is to designate goods as the product of a particular trader and to protect his good will against the sale of another's product as his.

The power to protect trade-marks and good will does not imply the power to invade the Constitution and fix prices and the Fair Trade Act is arbitrary, and unnecessary, because the declared purpose of protecting the trade-mark owner, distributor and the public can be accomplished by laws other than price fixing.

The law of trade-marks is but a part of the broader law of unfair competition and its sole purpose is to prevent "passing off" a species of fraud. (*United States* v. *Schechter*, 295 U. S. 495.)

These fundamental principles are declared in numerous cases. For example:

> "The law of trade-marks is but a part of the broader law of unfair competition; the right of a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; * * *." (*United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97, 98.)
>
> "A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." (*Prestonettes, Inc.*, v. *Coty*, 264 U. S. 359, 368.)

From this basic concept of a trade-mark is deduced the correlative rule that a trade-mark, unlike a patent or copyright, gives no right to prevent a third person from using goods bearing the mark in any manner he chooses, provided that he tells the truth and does not palm off his goods

as those of a trade-mark owner. (See *United Drug Co.* v. *Rectanus*, 248 U. S. 90, 97-98.)

The owner of goods bearing another's trade-mark may repack them, break them up, compound them with other products and resell them in an altered state provided that he tells the truth. Such was the holding of this Court in *Prestonettes* v. *Coty*, 264 U. S. 359, where Mr. Justice Holmes, speaking for the Court, said (p. 368):

> "The defendant, of course, by virtue of its ownership, had a right to compound or change what it bought, to divide either the original or the modified product, and to sell it so divided. The plaintiff could not prevent or complain of its stating the nature of the component parts and the source from which they were derived, if it did not use the trade mark in doing so. For instance, the defendant could state that a certain percentage of its compound was made at a certain place in Paris, however well known as the plaintiff's factory that place might be. If the compound was worse than the constituent, it might be a misfortune to the plaintiff, but the plaintiff would have no cause of action as the defendant was exercising the rights of ownership and only telling the truth. The existence of a trade-mark would have no bearing on the question. Then what new rights does the trade-mark confer? It does not confer a right to prohibit the use of the word or words. It is not a copyright. The argument drawn from the language of the Trademark Act does not seem to us to need discussion. A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. * * * When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo * * *."

To the same effect see:

Russia Cement Co. v. *Frauenhar*, 133 Fed. 518.

The presence of another's trade-mark upon goods which one lawfully owns does not permit the trade-mark owner to

limit in any manner the sale of such goods. In *Gorham Mfg. Co.* v. *Emery-Bird-Thayer Dry Goods Co.*, 92 Fed. 774, aff'd 104 Fed. 243, the Court stated (p. 779):

> "When a manufacturer parts with his goods, and they go upon the market, any third person has the right to purchase and sell them as he pleases, without the consent of the manufacturer; and the courts will not aid the manufacturer, under the guise of protecting his trade-mark or the suppression of unfair competition, by permitting him in such litigation to discover the sources from which an objectionable merchant—to him—obtains his supply."

See, also:

Vitascope v. *United States Phonograph Co.*, 83 Fed. 30.

Similarly it is established by numerous decisions that a trade-mark, brand or name gives the manufacturer no right to fix the resale prices of other people's property.

John D. Park & Sons Co. v. *Hartman*, 153 Fed. 24;

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373;

Boston Store v. *American Graphophone Co.*, 246 U. S. 8;

Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441;

Straus v. *Victor Talking Machine Co.*, 243 U. S. 490;

Bauer v. *O'Donnell*, 229 U. S. 1;

Bobbs-Merrill v. *Straus*, 210 U. S. 339.

In short, there is nothing mysterious about a trade-mark. It is a mark of origin and nothing more. Its sole function is to prevent another from passing off his goods as those of the trade-mark owner. A trade-mark affixed to goods gives the owner no property in the goods after he has sold

them. He cannot then, by virtue of his trade-mark, limit the use or disposition of the goods or fix the resale price.

(2) The constitutionality of this statute is not sustained by giving to a trade-mark (or a brand or name that is not a trade-mark) a legal effect which, in its nature, it cannot have.

The whole argument as to the power of the trade-mark owner to evade the constitutional inhibitions against deprivation of liberty of property without due process of law is a linguistic trick. It is said, in effect, that although the Constitution forbids the legislature to fix the selling price of any ordinary commodity, and *a fortiori* to delegate the unfettered power so to do to private persons, the legislature, nevertheless, by defining the term "trade-mark" as something other than it is, can evade the constitutional limitations upon legislative power. In other words, by the device of calling private price-fixing an attribute of trade-mark ownership, the legislature can decree that no one can sell his chair, or his desk, or any other article which he owns, except at a price fixed by another; and all that is necessary to make such a price-fixing statute constitutional is the stamping of a name or brand on any article of commerce.

If we pursue this argument somewhat further, it becomes even clearer that it is simply word-play to avoid the constitutional guaranties of liberty and property. The statute's defenders say that a statute is valid if it provides that where a manufacturer of chairs affixes a cross or an arrow or his name to his chairs, and contracts with a single retailer that the latter shall not resell such chairs for less than a given price, then every other retailer who buys such chairs for resale is restrained from selling below that price, although he has signed no such contract and has even refused to sign it. If one manufacturer of chairs can do

this, so can all the other manufacturers of chairs. If manufacturers of chairs can do it, so can the manufacturer of tables, flour, bread, cosmetics, books, medicines and every other article used by man. We thus have a complete and all-comprehensive system of price-fixing affecting all ordinary commodities. And all this is accomplished, with due respect to the Constitution, merely because the legislature, instead of calling price-fixing by its true name, has called it an attribute of trade-mark ownership. By this very clever device the legislature, it is asserted, can enact a permanent system of private price-fixing applicable to all ordinary commodities and all businesses, although the United States Supreme Court and this Court have said time and again that the Constitution forbids it.

The proponents of the statute argue that the manufacturer of an article bearing a mark or brand should have the right to fix the resale price even against a retailer who owns the article but has failed or refused to sign a price-fixing agreement because such a retailer is not required to buy the article; that if he buys after notice he "consents" to the restriction (despite actual refusal to assent); and that no right of the retailer is invaded because the manufacturer is not required by law to sell him.

In the first place, the retailer may not have bought from the manufacturer. He may, after the manufacturer has put the goods into the channels of trade, have purchased from a third party who was entirely willing to sell without any restriction and who may or may not have made a contract with or without restriction with the manufacturer.

But the argument proves too much. It destroys the claim that it is a trade-mark which is supposed to give price fixing powers. The manufacturer of any commodity even without a mark is not required to sell his goods to another. Similarly, the retailer is not required to buy. But if he

does buy, does the fact that the manufacturer of the unbranded goods was not required to sell give such manufacturer the right to fix the resale price in the absence of a voluntary contract? If not, then how does the mere right not to sell on the part of the manufacturer using a brand affect the purchaser's right to resell at whatever price he pleases? If the right to choose customers is the test, both manufacturers of branded and unbranded goods have the same right. If the latter cannot constitutionally impose price restrictions on the buyer's property without his consent, neither can the latter.

The constitutionality of this statute must be judged by what it does. (See *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53.) It provides for private price-fixing applicable to all commodities subject only to the will of the manufacturer. No matter how it is described or disguised it does just that. Price-fixing by whatever name is still price-fixing and a statute which so provides under the authorities cited is unconstitutional.

(3) The constitutionality of this statute cannot be sustained under the guise of protecting trade-mark owners' good will.

Plaintiffs assert that price-cutting (whatever it may mean) injures trade-mark owners' good will, and that legislation to protect that good will may constitutionally permit manufacturers to fix the resale price of branded articles after they have sold them.

We challenge the basic assumption of this argument. Reselling a trade-marked article for less than the price arbitrarily fixed by the manufacturer does not damage the latter's good will in any proper sense of that term. A merchant enjoying a profitable business could not be protected (under the theory of "protecting his good will") by

a statute prohibiting other merchants from moving into his vicinity, and by lower prices and more efficient operation, attracting his customers. Reselling for less than the manufacturer's fixed price is in no sense passing off another's goods as his. It is no reflection upon the quality of the goods bearing his mark. Indeed, selling below the fixed price may enhance the manufacturer's good will if he has a product of merit, by enlarging its use and by making it available to people who could not afford to buy it at a higher price.

If, however, we assume that ordinary honest commercial transactions, such as have heretofore always been regarded as beneficial, impair somewhat the manufacturer's good will, the legislature cannot forbid such transactions merely to benefit the manufacturers. Although the abolition of the exercise of liberty and property rights of some might benefit others, citizens cannot be deprived of their liberty or property except for a proper public purpose and by proper means.

Mere benefit to one group is not sufficient to justify a statute which deprives others of liberty or property. The inhabitants of a city might be benefited if all butchers were required to give away their meats; yet we know that a statute requiring this would be void. Some merchants would be benefited if others were prevented from competing with them; yet we know that a statute proscribing such competition would be invalid. (*People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53.) The owners of existing ice plants would doubtless be benefited by closing the ice business to newcomers; yet we know that the state may not do this. (*New State Ice Co.* v. *Liebmann*, 285 U. S. 262.) White people owning real property in a certain locality might enjoy enhanced property values because of a statutory prohibition of sales of real property in the locality to negroes;

yet we know that such a statute is unconstitutional. (*Buchanan* v. *Warley*, 245 U. S. 60.)

It is certainly a novel doctrine of constitutional law that the legislature may deprive one person of his liberty and property for the benefit of another. The true doctrine is that no person shall be deprived of his liberty or property without due process of law, even though others might benefit by such deprivation. The urban population may not be taxed to benefit the farmer, when the AAA was held unconstitutional in *U. S.* v. *Hoosac Mills*, 297 U. S. 1.

Even if the assumed benefit to trade-mark owners or certain others were sufficient to justify the purpose of this statute, it could not justify the means adopted. The legislature, as the cases above cited show, cannot place in the hands of private persons the unlimited and unrestrained power which this statute lodges there.

(4) The constitutionality of the statute cannot be sustained by the argument that a retailer buying branded goods with knowledge of an existing contract between the manufacturer and someone else fixing a resale price on other goods bearing the brand takes subject to the price restriction.

Unless the statute upon which the plaintiffs rely can be upheld, there is no price restriction on property acquired by one who has himself made no contract merely because he has knowledge of a price fixing contract between other persons. Plaintiffs assume the validity of the statute to sustain the claimed limitation on property, and then they assert that the limited property interest sustains the statute.

In fact, the plaintiffs' argument on this point is just mere word-play. Just as plaintiffs have attempted to sustain private price fixing of ordinary commodities by attributing price-fixing powers to trade-mark ownership,

rather than calling them what they are, so here they attempt to disguise price-fixing by asserting that the property which a retailer has in branded goods is a limited property.

The plaintiffs' argument comes merely to this. The statute gives a manufacturer the power to fix the resale price on any article of commerce which other persons own, if the article bears the manufacturer's brand or name. Plaintiffs then describe this situation as a reservation of property in the manufacturer and a limitation upon the property acquired by the other persons. They conclude from this that the statute is merely defining property rights; that therefore it does not deprive anyone of property; and that therefore by these magic words the legislature has hurdled all of the constitutional barriers forbidding a private price-fixing statute covering practically all commodities.

It is to be noted that this argument is entirely the plaintiffs' creation. The statute itself does not speak of reserving any property to the manufacturer or limiting any property of the retailer. It speaks of a sale and by the terms of the statute price-fixing power is given to private persons after they have sold the property over which the power is to be exercised. By its express language the statute speaks of the buyer as "the owner" (Sec. 1 (2) (a)). The very language of the statute is repugnant to plaintiffs' argument here considered.

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, this court held that a sale was a sale, and that an attempt by a vendor to sell the property and reserve the power to fix prices by the device of calling the sale a patent license would not be tolerated. The Court, by Mr. Justice Clarke, said (pp. 500-501):

"Courts would be perversely blind if they failed to

> look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

Furthermore, the statute itself completely destroys plaintiffs' argument about a reservation of power in the trade-mark owner to protect his own property interest. The statute gives price-fixing powers to "any vendor." Thus one who does not own the trade-mark, and who has no good will attached thereto, may "reserve" to the trade-mark owner a "property" which he did not reserve to himself, and limit the property of a retailer who never consented to any limitation on the property which he bought.

The legislature cannot deprive citizens of liberty or property without due process of law merely by changing the definitions of property. It cannot by definition in effect take from one person and give to another. It cannot by definition deprive citizens of their right to acquire, use and dispose of the ordinary commodities used in daily life nor can it under the guise of defining property restrict liberty. No legislature can define away the Constitution.

A statute, for example, could not prohibit the sale of real property in a given area to negroes, although the prohibition of such sales was avowedly for the purpose of protecting the property values of other property owners who had lived in the area for generations, who had invested money in the improvement of their own property, and who had landscaped and beautified the area. (See *Buchanan* v. *Warley*, 245 U. S. 60.) Such a statute could not be upheld by asserting that it merely "limited" or "defined" the property of a particular person for the benefit of other property holders whose property might be depreciated in value by the proscribed sales.

If the constitutional guaranties are to be evaded by any such legislative definition of terms (and again we repeat there is no such language in this statute), the Constitution is a dead letter.

Whatever language the plaintiffs may use to describe this statute or its *modus operandi*, the cases hereinbefore cited show that the courts in passing upon the constitutionality of a statute look at its effect. If the effect of the statute (which in this case is private price-fixing with respect to all ordinary commodities) is to transgress the Constitution, the statute is invalid, no matter how it is described, and no limitation of property can be implied by reason of an unconstitutional statute.

(5) The constitutionality of the statute cannot be sustained by denominating the imposed price restrictions as "equitable servitudes."

The plaintiffs do not, and in view of the language of the statute and the admitted allegations of the pleadings cannot, claim that there is any equitable servitude on the merchandise which the defendant offers for sale. The defendant's goods were never subject to any price restriction unless such restriction is imposed by the statute here under attack. The statute, by its terms, purports to impose a restriction on defendant's goods regardless of any restriction imposed thereon by any contract covering them. The statute says that although the goods were never subject to a price-fixing contract, the mere fact that the plaintiffs made a contract between themselves, covering other goods bearing a like mark, requires the defendant, who has signed no contract, to be bound by the terms of a contract between other persons.

The law concerning equitable servitudes on chattels is well set forth in *Garst* v. *Hall & Lyons Co.*, 179 Mass. 588,

61 N. E. 219. There it was held that a manufacturer of medicine, who invariably sold his product under a contract whereby his vendee agrees not to resell for less than the fixed price, could not enjoin one who subsequently bought from such vendee from selling below the fixed price. The Court, per Mr. Justice Knowlton, said (61 N. E. 219, 220):

> "The transactions between the plaintiff and his vendee set out in the bill plainly are sales which pass the title to the property. It is equally, or perhaps more, plain that the contract contemplated sales by retailers, which shall pass an absolute title to the property. The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it, or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages. *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174. This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority, nor of any sound principle, which will justify us in so holding. The plaintiff's trade-mark does not give him the rights of a patentee in property manufactured under a patent. His trade-mark is to secure him and the public from deception and fraud as to the origin and source of these goods and of similar goods sold in the market. The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but, even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison* v. *Maynard, Merrill & Co.*, 10 C. C. A. 17, 61 Fed. 689. See, also, *Clemmens* v. *Estes*, (C. C.) 22 Fed. 899; *Meyer* v. *Estes*, 164

Mass. 457, 41 N. E. 683, 32 L. R. A. 283; *Waterman Co.* v. *Waterman*, 27 App. Div. 133, 50 N. Y. Supp. 131. In the present case there was not only no contract between the plaintiff and the defendant, as in *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67, but there is no averment or proof that the defendant fraudulently induced and procured the breach of a contract between the plaintiff and any of his vendees, to the detriment of the plaintiff, as did the defendant in *Exchange Tel. Co.* v. *Central News*, (1897) 2 Ch. 48, and in *Standard American Pub. Co.* v. *Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. Supp. 55."

Similarly, Judge Lurton (later of the United States Supreme Court) said in *Park & Sons Co.* v. *Hartman*, 153 Fed. 24, 39:

"General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, sec. 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.' It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel (citing cases). Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights."

Hence we may say with assurance that there is no merit in any claim that the cases dealing with equitable servitudes on chattels demonstrate by analogy the reasonableness of this statute.

(6) The constitutionality of the statute cannot be sustained by the argument that it merely gives a cause of action against persons inducing breach of contract.

There is no charge here that the defendant has made any effort to induce a breach or to interfere with any contract. Indeed, it is not claimed that any act of the defendant is apt to cause a retailer or distributor to break its contract with the plaintiff.

Defendant is merely selling its own goods at prices lower than those agreed upon by the plaintiff and others in a contract wholly between themselves.

The doctrine of *Lumley* v. *Gye*, 2 El. & Bl. 216, has never been extended to protect contracts against the incidental economic effects of another's exercising his own rights in a lawful way.

Surely a landlord would have no cause of action against those who compete with his tenant merely because incidental to such competition the tenant might not make enough money to pay his rent. Such is the extension of law which the plaintiffs would have to urge.

The law with respect to inducing breach of contract stops far short of where the plaintiffs would have it.

Lamport v. *4175 Broadway, Inc.*, 6 Fed. Supp. 923;
Sweeney v. *Smith*, 167 Fed. 385, aff'd 171 Fed. 645, cert. denied, 215 U. S. 600.

(7) The constitutionality of the statute cannot be sustained on the theory that the statute is reasonable because it gives a cause of action only to a "person damaged."

This argument begs the question before the Court, for there is no legal damage unless the statute is constitutional.

There can be no legal damage without the violation of a legal right. (1 Sutherland, Damages, 4th Ed., Sec. 2.) If one suffers injury from acts which are not legally culpable, the injury is *damnum absque injuria.* (1 Sutherland, Damages, 4th Ed., Sec. 3.)

Here the plaintiffs' claim of damage is dependent upon a statutory right. If the basic statute is unconstitutional, there is no right in the plaintiffs, and they have sustained no legal damage.

In *Buchanan* v. *Warley,* 245 U. S. 60, the Court held unconstitutional a statute forbidding sales of real property to negroes under certain circumstances. The statute was enacted for the purpose, among others, of protecting real estate values of adjoining land owned by white people. Could anyone assert that one property owner suffered legal damage because another sold his land to a negro, even though the sale in fact caused depreciation of property values?

An unconstitutional statute cannot be made constitutional by limiting its enforcement to causes of action in favor of persons who may suffer monetary loss from its violation. Before injury or damage must come right.

If the legislature regarded distribution by chain stores as the only desirable method of retailing, and accordingly passed a statute declaring retailing by others than chain stores to be unfair competition actionable at the suit of any chain store damaged thereby, the statute would be as unconstitutional as if it made the proscribed retailing a crime.

C. If it be assumed contrary to fact, that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are wholly irrelevant to the purpose.

Merely selling below a price dictated by another does not involve any passing off, any counterfeiting, any slander of goods or of persons, any fraud on the public or any dishonesty. The statute says in effect that no retailer can sell his own goods at his own price if they bear the producer's mark or name although the goods are genuine, although no customer is deceived and although the retailer's price is dictated by fair competition with other retailers and even yields him a substantial profit. This statute seeks not to eliminate unfair competition, but to prohibit all competition in the retail field with respect to such commodities (cf. *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53, discussed *supra*, pp. 52, 53).

It is wholly immaterial that the legislature has declared that selling one's own property below the price arbitrarily dictated by another is "unfair competition." Selling one's own goods below a price fixed by a manufacturer or a wholesaler is not unfair competition and no legislative declaration can, with due regard to the Constitution, make it unfair competition.

The legislative purpose and the means adopted by the legislature to achieve that purpose are always subject to judicial scrutiny. If the purpose be not a valid one and if the means adopted to achieve the purpose are unreasonable, arbitrary or discriminatory, or if they are irrelevant to a proper constitutional purpose, the courts may so declare, whatever language the legislature may have used.

See:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 536.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398, 442.

Not infrequently have legislatures sought to justify price regulation of ordinary commodities by declaring that such regulation was a means of achieving a valid constitutional purpose. Time and again the courts have looked through the legislative declaration and have held that the legislature could not by this method fix the price of ordinary commodities and thus deprive citizens of their constitutional rights of liberty and property.

In *Williams* v. *Standard Oil*, 278 U. S. 235, the Court held unconstitutional a State statute attempting to fix the price of gasoline, although the legislature declared that the regulation was to prevent unfair and improper trade practices and that the gasoline business was affected with a public interest.

Again, in *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, the Court held unconstitutional a State statute attempting to make the price of dairy products as fixed by a single transaction the uniform price throughout the State, although the legislature declared that the regulation was for the purpose of preserving free competition.

In *People* v. *Gillson*, 109 N. Y. 389, the proponents of the legislation there challenged sought to support it as a means of preventing fraud and adulteration of food, and argued that no one could sell an article for less than his competitors and at the same time deal honestly. The Court, while recognizing that the legislature had power to prohibit the adulteration of food, rejected the argument and condemned the statute as unconstitutional. The Court pointed out that giving gifts or selling for less than competitors is not dishonest and "may simply be the old story of a small profit on large sales instead of a large profit on small sales." The Court likewise noted that the effect of the statute was not to preserve fair competition, but to eliminate competition and destroy constitutional rights.

Similarly, the courts have condemned price-fixing statutes, although the legislature has declared that the business sought to be regulated was affected with a public interest.

See:

New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Tyson v. *Banton*, 273 U. S. 418.

The price of theater tickets cannot be regulated by a legislative declaration that a theater is a railroad or a public utility. The right of a person to sell ordinary commodities which he owns at his own prices cannot be curtailed by calling such a sale unfair competition.

The Federal courts, in applying the Federal anti-trust laws, have held in numerous cases that agreements and combinations whereby manufacturers fix resale prices are illegal and even criminal restraints of trade, and are inimical to free and fair competition. The Federal Trade Commission, an administrative body charged by law with the duty of preventing "unfair methods of competition," has time and again prosecuted people for maintaining resale prices. Among the numerous Federal cases heretofore cited are *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490.

Are we to say that the mere legislative declaration that competition (although of a type required by Federal law and recognized by all standards as proper and desirable) is "unfair", is sufficient to abrogate the constitutional guarantees against deprivation of liberty and property, without due process of law?

The opinion of the Chief Justice in the Schechter case on this precise point is an emphatic negative (79 L. Ed. 888, at pp. 895-899).

Even if this statute were aimed at the prohibition of sales below cost (which it is not), such sales cannot properly be held to constitute unfair competition.

Sears, Roebuck Co. v. *Federal Trade Commission*, 258 Fed. 307.

Sinclair Refining Co. v. *Federal Trade Commission*, 276 Fed. 686, aff'd 261 U. S. 463.

S. S. Kresge Co. v. *Champion Spark Plug Co.*, 3 Fed. (2d) 415.

In the Sears, Roebuck case (*supra*), the court said, page 312:

> "We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

The Brookings Institution Survey comments adversely on NRA codes which contained general provisions against sales below cost, stating:

> "It is a well-known business fact, however, that there are conditions in which business men find it profitable for a time to sell below their costs—even their direct costs—even though they have no hope of thereby attaining a monopoly position. During periods of depression, for example, nothing is more common than business men selling below cost 'to stay in the business picture.' Far from hoping to attain a monopoly, they hope merely to stay alive."

The effect of this statute is to strike down all price competition in a particular commodity between retailers if a manufacturer so decrees. It forbids honest dealing and the honest use of one's own property. It has no relation to anything which has ever been understood to be embraced

within the meaning of the term "unfair competition." As the cases hereinbefore cited show, the legislature cannot enlarge its own power so as to deprive citizens of liberty and property without due process of law by the use of an epithet.

To summarize:

A. Plaintiffs' cause of action is based entirely upon Section 2 of the statute.

B. Section 2 of the Act provides that a man may not sell his own property for less than the price fixed by other private persons in their absolute and unlimited discretion. Those persons are given power without limitation and without any supervision or restraint imposed by the State to fix the price at which other people may sell their own property. The power may be exercised over most of the commodities that people own and use and may be exercised arbitrarily, capriciously or maliciously.

C. We submit that Section 2 is unconstitntional as depriving retailers of liberty and property without due process of law.

(1) because the legislature is without constitutional power to enact a general price-fixing statute applicable to all commodities and all business, and

(2) because the challenged statute is arbitrary, discriminatory and irrelevant to any valid legislative purpose.

D. Insofar as it applies to retailers who have not signed price maintenance agreements, the statute cannot be sustained. It is arbitrary and discriminatory:

First. No official state body is set up to fix prices. It is left to private individuals, producers, to determine, firstly, whether prices should be fixed, and, secondly, at what level. No outsider, who may be ultimately bound by the determination, is permitted an opportunity to be heard

on either question. The retailer, who is going to be restricted in the conduct of his own business by the conclusion reached, is not allowed to present his views as to the reasonableness of the price, or, indeed, as to the necessity for fixing any price. The consumer, who must bear the burden of the increased price, has no opportunity to be heard before the prices are fixed. No machinery is provided for judicial or administrative review of any of the acts of producers and retailers in fixing prices.

Second. Before prices are fixed for any commodity, there is no finding by any legislative or administrative body that price fixing is necessary. That question is left to the individual whim of each producer.

Third. There is no standard set up for the contract to be entered into between producer and retailer, by virtue of which contract the conduct of all retailers are to be governed. The contract may be oral or in writing. There is no requirement that the contracts be uniform. There is no requirement that the prices be uniform among retailers. Various special privileges may be given in connection with the contracts to some retailers, and not to others.

Fourth. There is no standard set up, which is adjustable to particular conditions in given localities. So far as the statute is concerned, if the operator of a large department store in Chicago knows of a contract made by the plaintiff with a small merchant in a rural community in the far western part of the state, the Chicago department store merchant must comply with the price fixed by the producer in its contract with the rural merchant.

Fifth. No standard is set up to guide non-contracting retailers as to which contract they are to be bound by. So far as the statute prescribes, the producer may have many different forms of contract. He may make changes in these contracts. In fact the contract annexed to the complaint

herein, permits the producer "from time to time in its sole discretion to revise such minimum resale prices and provides that such revised resale prices shall become effective at such time as specified by plaintiff." The burden is placed upon each non-contracting retailer to select which of the various forms of contract he is to follow. Is he to be guided by the most favorable form offered to any retailer? The statute merely says: "any contract." And there is no assurance that if he selects one, the producer may not complain that he should have selected another. Non-contracting retailers must, at their peril, follow all price changes, although there is no requirement that notice thereof be given to them.

Sixth. There is no standard set up as to the method of fixing prices. Once a producer determines in his own discretion, untrammeled by any official finding of necessity, or by any public convenience to be served, that prices should be fixed, the amount of the price is in the uncontrolled will of the producer. He may be guided by mistake, ignorance or malice. The price fixed by him may be wholly unreasonable and unfair. It may provide an exorbitant profit to himself and a small profit to the retailer. It may be so unreasonable that few, if any, retailers would be willing to abide by it. Yet, according to the statute, if he succeeds in making a contract with one retailer; all other retailers in the state are bound thereto.

Seventh. The statute sets up no reasonable standard between practices which are honest and fair and those which are dishonest and unfair. There is no statement of any statutory policy making such distinction; nor is the statute directed exclusively toward unfair or predatory conduct. Even though a retailer charge a fair price for his commodity involving a fair profit to himself, he may still be enjoined or mulcted in damages merely because the

price he charges is not as exorbitant as the producer desires it to be.

Eighth. The statute furnishes no standard for its enforcement. No state officer or agency is created for the purposes of enforcing it. No governmental body has the responsibility of compelling compliance. Indeed, there is no legislative determination as to when and where enforcement shall be attempted at all. The matter is left to the producer. It is difficult to see how anyone else would come within the class set up in section 2 of the statute—"any person damaged thereby." It lies within his discretion to enforce, or not to enforce, his agreements against any retailer, contracting or non-contracting. He may decide to compel obedience by one retailer and shut his eyes to violations by competitors of such retailer. It is obvious that there is thus deposited in the hands of a producer the power to drive one retailer from business in his commodities, and leave unmolested another retailer who violates the same fixed prices. Non-compliance with the statute is not made a crime: the state can in no way become a party to the enforcement process. It is left wholly to the whims and caprice of each producer. And even if the statute gives the power to other parties who may be "damaged thereby" the same arbitrary and discriminatory exercise of it is made possible.

Nor can it be said within the principle of *Nebbia* v. *New York*, 291 U. S. 502, that the provisions of the statute are wholly relevant to the policy of it and to the abuses which it was designed to abolish. If the statute was aimed at "loss leaders" its terms do not so indicate. A retailer may, indeed, be selling at a fair profit and yet violate the statute, if he sells it for one cent below the price fixed by the producer.

If the purpose of the statute was to prevent "predatory

price cutting," and if we assume that that phrase means price cutting with an intent to injure competitors, the statute is not restricted by its terms or by fair interpretation to the eradication of that evil. The law applies to all retailers, irrespective of their motive or intent in selling their own property at lower prices. Without regard to the effect upon competitors, the retailer by this statute is compelled to charge his customers a higher price that might afford him a reasonable profit, even though his class of customers might not be willing to pay such price.

The importance of the motive in price cutting and price discrimination is illustrated by the two cases of *Fairmont Creamery Co.* v. *Minnesota*, (274 U. S. 1) and *Central Lumber Co.* v. *South Dakota*, (226 U. S. 157). In the latter case this Court declared constitutional a South Dakota statute which prohibited price discrimination "for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent competition of any person who, in good faith, intends and attempts to become such dealer." In the former case, however, this Court declared unconstitutional a Minnesota statute which prohibited price discriminations without regard to the motives behind them.

The absence of fair standards in this statute, and the controlling effect of the whim of a producer over the business of others, render the statute unconstitutional as arbitrary, discriminatory and unreasonable.

CONCLUSION.

The decision here involved is of tremendous importance not only to the (defendants) appellants in this case, but also to the consuming public who are not here represented. The case is of no less importance to the people at large perhaps, second only to the recent case of *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495, where this Court passed upon the validity of an act of Congress seeking to control and fix prices in businesses and industries throughout the country by codes, which in effect is the identical thing which the "Fair Trade Act" seeks to accomplish in Illinois for business, and contrary to constitutional authority.

Where does this extraordinary power over business operations begin, and where may it be said to end? When, if ever, did the legislature acquire the alleged right to legislate that a person may not sell or dispose of his own property at such prices, and in such manner as he may lawfully do under the safeguards provided by the fundamental Laws of the Land? Have the constitutional guaranties become nullities and ceased to operate upon the legislature? These and many other important questions are definitely involved in this case.

The answer to each of the questions is obvious—no such rights exist in the legislature, and the Constitution of the United States is still the Supreme Law of the Land.

We submit we have conclusively shown that the legislature exceeded its constitutional powers in enacting the Illinois Fair Trade Act.

We submit no substitute has yet been discovered for the old tried law of economics that prices are naturally fixed by supply and demand.

If the effort manifested by the legislative enactment of the Fair Trade Act, and the issuance of this injunction by the Court to regulate private business and conduct by fixation of prices, which cannot conceivably be constituted a public use or vested with a public interest, be sustained, then the extension of similar laws and injunctions to every trade and every occupation to illimitable bounds can reasonably be expected.

A statute imposing privately made contracts upon nonconsenting persons, without uniformity of regulation, price, region or motive, and without confinement to predatory price cutting is invalid.

Irrespective of the theory that economic and legal orders are inseparably fused, and the so-called fundamental necessities of the socio-economic society, obvious rules of interpretation of constitutional provisions tie the hands of the Court until and unless basic changes are made in the existing positive law. The history of price fixing from the economist's viewpoint is, like the pathway of science, strewn with wrecked hypotheses.

The extraordinary feature of the present resale price-fixing provisions of the Fair Trade Act and this injunction, that place an ordinary individual in contempt of Court, with a drastic remedy of fine or imprisonment, all because a small retail storekeeper insists upon his property rights for the sale of his goods and wares at a price satisfactory to himself and his customers, is a most unreasonable and oppressive deprivation of the inherent rights of an individual. The Federal Constitution is not a thing to be extolled merely in academic halls, or to be the subject of juvenile orations, but is vibrant and designed to safeguard not only life and liberty, but also property rights in time of stress and suffering, when despairing and des-

perate majorities seek by forbidden methods the subversion of fundamental principles of government.

We submit that the decision of the Illinois Supreme Court affirming the decree granting the injunction is in error and should be reversed and the injunction dissolved.

Respectfully submitted,

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